Supreme Court, U.S.
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No. 99-1710

In The

SUPREME COURT OF THE UNITED STATES

STATE OF UTAH,

Petitioner,

v.

LINDA CANNON

Respondent.

On Petition for Writ of Certiorari to the
Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Utah brought a civil asset forfeiture action against real property owned by Linda Cannon for violations of the Utah Controlled Substance Act, Utah Code Ann. § 58-37-13 (1993). Cannon was also charged criminally in three separate proceedings and convicted of multiple drug charges. Following a subsequent bench trial, the forfeiture trial court entered a judgment against the property, and Cannon appealed. The Utah Supreme Court held that forfeiture of the entire property would constitute an excessive fine. The Utah court disregarded the forfeiture trial court's instrumentality findings and designed a "gross disproportionality" test which hinged on the actual sentence imposed upon the claimant in the companion criminal cases.

This Petition presents the following questions:

1. Whether Eighth Amendment excessive fines analysis requires a court to give separate consideration to the remedial portion, if any, of a civil in rem forfeiture.

2. Whether an excessive fines test distinct from that set out in United States v. Bajakajian, 524 U.S. 321 (1998), is necessary to adequately address the unique character of civil in rem forfeitures involving crime instrumentalities.

PARTIES TO THE PROCEEDING

Petitioner is the State of Utah, which filed this civil asset forfeiture action pursuant to Utah Code Ann. § 58-37-13 (1993). App. at 37-46. The State of Utah was the plaintiff in the trial court and the appellee in the Utah Supreme Court.

Linda Cannon is the claimant to the subject real property, which was the defendant in the trial court and appellant in the Utah Supreme Court.

TABLE OF CONTENTS

OPINION BELOW.....1

STATEMENT OF JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE WRIT.....6

I. Recognition and excision of the remedial portion of an in rem instrumentality forfeiture are appropriate under current Eighth Amendment authority, but were ignored by the Utah Supreme Court.....7

II. Forfeitures of property instrumental to illegal conduct are unlike in personam monetary sanctions and require separate Eighth Amendment analysis.....17

CONCLUSION.....22

TABLE OF AUTHORITIES

FEDERAL CASES

Alexander v. United States, 509 U.S. 544 ..... 13, 16

Austin v. United States, 509 U.S. 602 (1993) ..... passim

Bennis v. Michigan, 516 U.S. 442, 116 S. Ct. 994 (1995) 14

Harmelin v. Michigan, 501 U.S. 957 (1991) 11

Rummel v. Estelle, 445 U.S. 263 (1980) 11

Solem v. Helm, 463 U.S. 277 (1983) 11, 14, 20

United States v. 829 Calle de Madero, Chaparral, Otero County, New Mexico, 100 F.3d 734 (10th Cir. 1996) 10

United States v. Bajakajian, 524 U.S. 321, 118, S.Ct. 2028 (1998) ..... passim

United States v. One Parcel of Property, 106 F.3d 336 (10th Cir 1997) 10

United States v. One Parcel of Property Located at 427 & 429 Hall Street, Montgomery, Montgomery County, Ala., 853 F. Supp. 1389 (M.D. Ala. 1994) 18

United States v. One Parcel of Real Property Located at 25 Sandra Court, Sandwich, Illinois, 135 F.3d 462 (7th Cir. 1998) 8

United States v. One Parcel Property Located at Lot 85, County Ridge, 100 F.3d 740 (10th Cir. 1996) 10

United States v. Real Property Located in El Dorado County at 6380 Little Canyon Road, El Dorado, California, 59 F.3d 974 (9th Cir. 1994) 8

United States v. Ursery, 518 U.S. 267 (1996) 13, 17

STATE CASES

State of Utah v. $175,800, 942 P.2d 343 (Utah 1997) 13

State of Utah v. Real Property at 633 East 640 North, Orem, Utah, 942 P.2d 925 (Utah 1997) 1

State of Utah v. Real Property at 633 East 640 North, Orem, Utah, 2000 WL 38480, at 7 (Cannon II) 5

State v. A House and 1.37 Acres of Real Property Located at 392 South 600 East, Nephi, Utah, 886 P.2d 534 (1994) 7

FEDERAL STATUTES

21 U.S.C. § 841 11

21 U.S.C. § 881 ..... 7, 8, 9, 12

28 U.S.C. § 1257 1

31 U.S.C. § 5316 ..... 9, 18

STATE STATUTES

Utah Code Ann. § 58-37-13 (1993) 2, 15, 16

Utah Code Ann. § 59-19-103 (1996) 3

Utah Code Annotated § 63-63a-1 (Supp. 1999) 11

Utah Code Ann. § 76-3-201 (Supp. 1999) 11

Utah Code. Ann. § 76-3-301 (Supp. 1999) 11

OTHER WORK CITED

"Forfeiture Law, The Eighth Amendment's Excessive Fines Clause, and United States v. Bajakajian," 74 Notre Dame L. Rev. 1371, 1388 (May 1999) 19

"United States v. Bajakajian: Will a New Standard for Applying the Excessive Fines Clause to Criminal Forfeitures Affect Civil Forfeiture Analysis?," 77 N.C. L. Rev. 1595, 1598 (April 1999) 19

"When Does In Rem Civil Forfeiture Under 21 USC §881(a)(7) Constitute an Excessive Fine?: An Overview and An Attempt to Set Forth a Uniform Standard," 47 Syracuse L. Rev. 1093 (1997) 8

OPINION BELOW

The Utah Supreme Court opinion reversing the judgment of forfeiture by the trial court is reported at 2000 WL 38480 and is included in Appendix 1-18. The Findings of Fact and Conclusions of Law in support of the Order of forfeiture are unpublished and included here in Appendix 47-61. The previous opinion of the Utah Supreme Court remanding the case to the trial court for specific findings on Cannon's constitutional claims is reported at 942 P. 2d 925 (Utah 1997), and is included in Appendix 19-36.

STATEMENT OF JURISDICTION

Petitioner State of Utah respectfully requests that a Writ of Certiorari issue from this Court to review a January 19, 2000 decision of the Utah Supreme Court. The Utah court relied upon the Eighth Amendment of the United States Constitution when it reversed the trial court's judgment of forfeiture. Petitioner has timely filed this petition for Writ of Certiorari within ninety days of the decision. This Court has jurisdiction pursuant to United States Constitution, Article III, section 2, and 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

2. Utah Code Ann. § 58-37-13 (1993) is reprinted in Appendix 37-46.

STATEMENT OF THE CASE

A. Material Facts

Linda Cannon was living in a single-family residence at 633 East 640 North in Orem, Utah on January 15, 1993. A search warrant was served there that day by the local narcotics task force, based in part upon three recent purchases of narcotics from that house. The warrant yielded a one-pound bag of marijuana, various smaller quantities of cocaine and marijuana, a beam scale, a set of finger scales, other drug distribution and use paraphernalia, and marked "buy money" used in the controlled buys. App. at 2-21. Based upon the narcotics found, Cannon was charged in state court with several counts of criminal conduct, and a separate civil forfeiture action was commenced against the property. During the pendency of those cases, two additional search warrants for drugs were served at the same house, on September 8, 1993 and June 24, 1994, resulting in seizure of more narcotics and distribution paraphernalia in each instance. App. at 21.

Cannon was convicted of criminal charges based upon the first search. She pleaded guilty to one of the four charges arising from the second search in exchange for dismissal of all five charges stemming from the third search. Her sentences in those cases were combined, and she was placed on probation. App. at 3. Fines and fees imposed upon Cannon totaled $4,625. In addition, pursuant to Utah's Illegal Drug Stamp Tax Act, Utah Code. Ann. § 59-19-103 (1996), tax warrants totaling $5,035.10 were issued on the marijuana found during all searches. App. at 16. A bench trial in the forfeiture proceeding was held before a different

judge, who entered judgment for the value of the property, between $71,272.30 and $80,000, in favor of the State. After various post-trial motions on the forfeiture, that court's order became final in September 1995, and Cannon appealed. App. at 21.

In this first appeal, the Utah Supreme Court upheld the verdict of forfeiture, but remanded for express ruling on claimant's constitutional claims under the Fifth and Eighth Amendment to the United States Constitution. App. at 30. The forfeiture trial court upheld the forfeiture, based upon its extensive Findings of Facts and Conclusions of Law. The trial court found that: the property was "a direct instrumentality of repeated instances of criminal conduct"; the "[r]emoval of the home from the claimant has had a direct impact for good in contributing to the termination of the claimant's extensive [criminal activity]"; "[f]orfeiture of this property, together with total fines and fees imposed imposes a financial impact upon the claimant of approximately $80,921.40 which is the equivalent of only 18 pounds of marijuana"; and "claimant received at least 5 months of in-patient, intensive drug therapy and the resources of this state have been extensively utilized to modify her substantial criminal behavior." App. at 55-57. Following affirmation of the original judgment of forfeiture, Cannon once again appealed. The Utah Supreme Court reversed the judgment. App. at 18.

B. Proceedings Below

Simultaneous to criminal prosecution in a separate proceeding, the State of Utah commenced a civil in rem forfeiture action against Cannon's property based upon the

quantity of the drugs seized in the first warrant search. After trial, the court found the property forfeited and entered judgment in favor of the State. Cannon appealed to the Utah Supreme Court, which affirmed the legal grounds and sufficiency of the evidence in support of forfeiture, but remanded for specific ruling on Cannon's constitutional claims under the Fifth and Eighth Amendments to the United States Constitution. App. at 30.

Upon remand, the trial court took judicial notice of Cannon's subsequent drug-dealing activities, concluding that Cannon's conduct was extensive and serious and that the forfeiture served many purposes, including a compensatory purpose for enforcement of Utah's controlled substance laws. In support of its ruling that forfeiture would not be an excessive fine, the forfeiture court computed the maximum possible fine for all fourteen criminal charges precipitated by the three searches, as well as total fines and fees for the charges on which Cannon was convicted, and recognized other state resources that had been expended in her behalf. App. at 56. In her second appeal, Cannon did not contest the factual findings of the trial court.

The Utah Supreme Court reversed the trial court's judgment of forfeiture, holding that, since the gravity of her offense was slight and the actual penalties imposed small (probation and $9,660.10 in fines, fees and other assessments), forfeiture would be a "gross disproportionality under the standards set forth in Bajakajian, and the forfeiture cannot be sustained." State of Utah v. Real Property at 633 East 640 North, Orem, Utah, 2000 WL 38480, at *7 (Cannon II). App. at 17.

REASONS FOR GRANTING THE WRIT

There is a climate of uncertainty surrounding civil in rem forfeitures, induced in part this Court's holding in United States v. Bajakajian, 524 U.S. 321, 118 (1998). In the midst of this puzzlement, the Utah Supreme Court recently erred when it misread and misapplied Bajakajian and other precedents. Rather than limiting the forfeiture to a nonexcessive amount, the court eliminated the forfeiture entirely. By creating an improper tie between civil in rem forfeiture and the actual sentence imposed, the Utah court did not give due deference to the Utah legislature's design. It also failed to consider the remedial aspects of forfeiture, ignoring the trial court's finding of remedial effect.

While it is this Court's latest statement on Excessive Fines protection, Bajakajian does not answer the questions of whether or when civil in rem forfeiture becomes "excessive." Worse, Bajakajian beguiles unwary courts like Utah's to apply its in personam, punitive forfeiture test to in rem actions without first determining whether the forfeiture has any remedial component. On that point, Bajakajian offers no help. This Court should use this case to clarify that testing the excessiveness of facilitation or "instrumentality" forfeitures requires judicial determination whether the forfeiture serves some remedial purpose. If so, then a distinct excessiveness analysis is necessary for this kind of forfeiture.

I. Recognition and excision of the remedial portion of an in rem instrumentality forfeiture are appropriate under current Eighth Amendment authority, but were ignored by the Utah Supreme Court.

This forfeiture arises under a Utah statute that the Utah Supreme Court has recognized as analogous to 21 U.S.C. § 881 (a)(7).[1] State v. A House and 1.37 Acres of Real Property Located at 392 South 600 East, Nephi, Utah, 886 P. 2d 534, 540 (1994). This Utah provision permits the forfeiture of property used to facilitate a drug offense, i.e., real property used to store and sell drugs. App. at 39. While the forfeiture trial court determined that forfeiture of Cannon's $71,272.30 to $80,000 in equity in the house was constitutional, the Utah Supreme Court declared the forfeiture as a whole violated the Excessive Fines Clause of the Eighth Amendment of the United States Constitution. In so doing, the Utah Supreme Court relied heavily upon this Court's decisions in Austin v. United States, 509 U.S. 602 (1993), and United States v. Bajakajian, 524 U.S. 321 (1998).

This Court has rarely discussed the Eighth Amendment in the context of its application to civil in rem forfeiture actions. Austin held that the Eighth Amendment protection against excessive fines applied to civil in rem forfeitures under 21 U.S.C. §§ 881(a)(4) and 881(a)(7)

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[1] The statute provided in the Appendix reflects the law in Utah at the time this forfeiture action was filed. Subsequent amendments to the statute have not altered any provisions discussed in this Petition.

because those statutes, although arguably remedial to some degree, result in a payment as punishment for an offense the equivalent of a fine. Austin was silent on what portion of the forfeiture should be considered a fine, or what test should be applied to determine that.

Since Austin, state and federal courts have labored independently to formulate an appropriate test by which to measure whether a civil in rem forfeiture engages the protections of the Excessive Fines Clause. See generally Note, "When Does In Rem Civil Forfeiture Under 21 U.S.C. § 881(a)(7) Constitute an Excessive Fine?: An Overview and An Attempt to Set Forth a Uniform Standard," 47 Syracuse L. Rev. 1093; United States v. Real Property Located in El Dorado County at 6380 Little Canyon Road, El Dorado, California, 59 F. 3d 974, 985 n.11 (9th Cir. 1994). Four and a half years after Austin, one federal circuit surveyed the various circuits and concluded that "the weight of authority among the courts of appeals strongly favors the use of both instrumentality and proportionality review in this context." United States v. One Parcel of Real Property Located at 25 Sandra Court, Sandwich, Illinois, 135 F. 3d 462, 465 (7th Cir. 1998).

This Court did not revisit the issue until recently in Bajakajian, this Court's first direct application of the Eighth Amendment to a forfeiture proceeding, albeit a criminal forfeiture. Because Bajakajian did not utilize an instrumentality test, as a majority of the circuits had done, the effects of Bajakajian on civil in rem forfeitures remains an open question.

In Bajakajian, the Government argued that defendant's $357,144 in currency was an instrumentality of the offense under 31 U.S.C. § 5316 and that its confiscation would thus be remedial. In ruling the money was not an instrumentality, this Court eliminated any instrumentality prong from its excessive fines test, because it was not necessary in that case. But it reinforced the notion that forfeiture of an instrumentality has a strong remedial component. Bajakajian 524 U.S. at 333 n.8. This coincides with Austin's recognition that a fine that serves purely remedial purposes cannot be considered excessive. Austin, 509 U.S. at 622 n.14. Read together, these cases suggest that some, if not all, of an instrumentality forfeiture should be considered remedial, and instrumentality is at the very heart of the statutes that commonly authorize the type of civil in rem action involved here.

The Utah Supreme Court decided this case solely upon federal constitutional grounds, and considered both Austin and Bajakajian. It is also clear that, because of the multiplicity of tests that have evolved since Austin, there is no uniform means for implementing Eighth Amendment protections in civil in rem forfeiture cases. Ironically, it appears that the same forfeiture barred by the Eighth Amendment in the Utah state court would be permitted as constitutional in Utah federal district court.[2]

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[2] A pre-Bajakajian Tenth Circuit case allowed forfeiture under 21 U.S.C. 881(a)(7) after the defendant had been convicted of federal offenses for possession with intent to distribute cocaine and marijuana. United States v. One Parcel of Property, 106 F.3d 336 (10th Cir. 1997). In that case the sentence imposed for the criminal violations included no

This highlights the concern that Eighth Amendment protections have varied depending upon which jurisdiction prosecutes. Whether these outcomes are now somehow modified by Bajakajian is a question this Court should undertake to resolve.

Eighth Amendment proportionality review has always required the reviewing court to extend great deference to the legislature. Rummel v. Estelle, 445 U.S. 263 (1980); Solem v. Helm, 463 U.S. 277 (1983); Harmelin v. Michigan, 501

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punitive fine, and the value of the property sought to be forfeited was $47,700. In upholding the forfeiture, that court ruled:

> Claimant was convicted of three drug crimes involving conspiracy and possession with intent to distribute cocaine and marijuana. Large amounts of cocaine and marijuana were found buried on the defendant property. The maximum fine authorized by Congress for each cocaine conviction was $2,000,000. For the marijuana conviction, the maximum authorized fine was $250,000. In view of the seriousness of these offenses and the sanctions imposed, forfeiture of the defendant property is not disproportionate and does not violate the Excessive Fines Clause.

Id. at 339. See also United States v. One Parcel Property Located at Lot 85, County Ridge, 100 F. 3d 740 (10th Cir. 1996); United States v. 829 Calle de Madero, Chaparral, Otero County, New Mexico, 100 F. 3d 734 (10th Cir. 1996).

U.S. 957 (1991). The legislative scheme in Utah to address controlled substance offenses contemplates relatively nominal fines[3] and civil in rem forfeiture of certain property involved in the offensive conduct. The Utah Legislature has expressed the mutuality of these sanctions in both the criminal sentencing and forfeiture procedure statutes,[4] and neither has been altered to limit or restrict the other. While this certainly does not preclude a reviewing court from assessing whether punishment in a particular case violates the Eighth Amendment, it is an unequivocal expression of the Utah Legislature's command regarding the disposition of drug offenses. In the instant case, it is entirely plausible that the sentencing judge imposed a minimal fine knowing of the pendency and likely success of the forfeiture action.

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[3] Fines for felony conduct in Utah range from $5,000 - $10,000. Utah Code. Ann. § 76-3-301 (Supp. 1999). Each fine imposed carries a mandatory 85 per cent surcharge. Utah Code Annotated § 63-63a-1 (Supp. 1999). By comparison, federal fines for offenses like those committed by Cannon could reach $250,000. 21 U.S.C. § 841(b).

[4] The Utah criminal sentencing statute, Utah Code Ann. § 76-3-201, states: "(3)(a) this chapter does not deprive a court of authority conferred by law to: (i) forfeit property . . . . The forfeiture provisions of the Utah Controlled Substances Act. Utah Code Ann. § 58-37-13(8)(a), provide: "Forfeited property under this section may not be applied by the court to costs or fines assessed against any defendant in the case."

In its opinion, the Utah Supreme Court over-generalized from Austin by presuming it "applied to drug-related forfeitures of property." App. at 5. What Austin really said was that forfeiture under § 21 U.S.C. 881(a)(7), analogous to Utah's statute, "is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." Austin, 509 U.S. at 622. But even the Austin majority conceded it is possible that some forfeitures under § 881(a)(7) may be, upon examination, purely remedial:

> Finally, it appears to make little practical difference whether the Excessive Fines Clause applies to all forfeitures under §§ 881(a)(4) and (a)(7) or only to those that cannot be characterized as purely remedial. The Clause prohibits only the imposition of "excessive" fines, and a fine that serves purely remedial purposes cannot be considered "excessive" in any event.

Austin, 509 U.S. at 622 n.14. The import of these words vis a vis severance of a facilitation forfeiture into its remedial and punitive parts is, as yet, unsettled. The Utah court paints with too broad a brush when it declares that the Excessive Fines Clause applies to all drug-related forfeitures of property.[5] This bold statement influenced the Utah court's

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[5]Perhaps the Utah court meant "real property" when it referred to "drug-related forfeitures of property," but that court has also ruled that forfeiture of property that is proceeds

conclusion that it must consider the entire value of the facilitation forfeiture in its Eighth Amendment analysis, simply because it may not be completely remedial. That reasoning ignores the lengthy discussions by this Court about the complex composition of civil in rem forfeiture and its objectives.[6]

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of drug activity is not punishment. State of Utah v. $175,800, 942 P.2d 343 (Utah 1997). Accord United States v. Alexander, 108 F.3d 853 (8th Cir. 1997).

[6] In recent years, this Court has frequently discussed the rich, remedial texture of civil in rem proceedings. E.g., Austin, 509 U.S. at 623 (Scalia, J., concurring) ("[T]he excessiveness inquiry for statutory in rem forfeitures is different from the usual excessiveness inquiry."); Alexander v. United States, 509 U.S. 544, 559 n.4 ("Unlike Austin, this case involves in personam criminal forfeiture not in rem civil forfeiture, so there was no threshold question concerning the applicability of the Eighth Amendment"); United States v. Ursery, 518 U.S. 267, 284 (1996)("Civil forfeitures, in contrast to civil penalties, are designed to do more than simply compensate the Government. Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law , and to require disgorgement of the fruits of illegal conduct. Though it may be possible to quantify the value of the property forfeited, it is virtually impossible to quantify, even approximately, the nonpunitive purposes served by a particular civil forfeiture."); Bennis v. Michigan, 516 U.S. 442, 452, 116 S.Ct. 994 (1995)("[F]orfeiture also serves a deterrent purpose distinct from any punitive purpose.").

The Utah Supreme Court misread Bajakajian as having determined that the test in Solem v. Helm, 463 U.S. 277 (1983), for assessing claims of cruel and unusual *punishment*, was "*adaptable for use* in forfeiture cases." App. at 9. But Bajakajian expressly limited its application to forfeiture intended only to punish. 524 U.S. at 333-34. It acknowledged the distinction between that type of punitive forfeiture and other in rem forfeitures of property used to facilitate an offense. In discussing why defendant Bajakajian's currency did not facilitate his offense, this Court observed:

> Acceptance of the Government's argument would require us to expand the traditional understanding of instrumentality forfeitures. This we decline to do. Instrumentalities historically have been treated as a form of "guilty property" that can be forfeited in civil in rem proceedings. In this case, however, the Government has sought to punish respondent by proceeding against him criminally, in personam, rather than proceeding in rem against the currency. It is therefore irrelevant whether respondent's currency is an instrumentality; **the forfeiture is punitive, and the test for excessiveness of a punitive forfeiture involves solely a proportionality determination** . . . . Until today, however, we have not articulated a standard for determining **whether a punitive forfeiture is constitutionally excessive**. We now hold that a **punitive forfeiture violates the Excessive**

Fines Clause if it is grossly disproportionate to the gravity of the defendant's offense.

Id. (emphasis added).

Having wrongly surmised that the Eighth Amendment applies to all forfeitures, and that "gross disproportionality" is the standard by which we measure the excessiveness of the entire forfeiture (notwithstanding any remedial component), the Utah Supreme Court exposed the absence of a test to assess the Eighth Amendment constitutionality of those that are not completely punitive or completely remedial.

Although the trial court found that the forfeiture was remedial, the Utah Supreme Court eliminated the forfeiture completely, without considering its reduction to a "nonexcessive" amount. The Utah court ignored the plain meaning of Utah's statute, which expressly permits apportionment of the forfeiture.[7] Even the claimant in her brief to the Utah Supreme Court acknowledged that reduction was appropriate. Instead, the Utah court placed inordinate

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[7]Section 58-37-13 (9)(i) states, with emphasis added: "When the court determines that claimants have no right in the property in whole or in part, it shall declare the property to be forfeit." Section 58-37-13(9)(j), with emphasis added, continues: "When the court determines that property, in whole or in part, is not subject to forfeiture, it shall order release of the property to the proper claimant. If the court determines that the property is subject to forfeiture and release in part, is shall order partial release and partial forfeiture." App. at 45.

reliance upon criminal culpability and the actual sentence imposed.

Constrained by its ill-conceived "gross disproportionality" test, the Utah court was destined to merely "re-sentence" the claimant. The court concluded Cannon should not be further punished by this civil forfeiture, without ever reaching the seminal question of what purpose this forfeiture was intended to serve. As this Court cautioned in an in personam RICO forfeiture, the question of excessiveness should be addressed, not in comparison to the penalty imposed by the sentencing court, but rather to the conduct of the claimant. "It is in light of the extensive criminal activities which petitioner apparently conducted through this racketeering enterprise over a substantial period of time that the question whether the forfeiture was 'excessive' must be considered." Alexander, 509 U.S. at 559. The Utah Supreme Court simply failed to do this, misapplying this Court's precedents and ignoring the trial judge and the Utah legislature in the process.

II. Forfeitures of property instrumental to illegal conduct are unlike in personam monetary sanctions, requiring separate Eighth Amendment analysis.

Austin and Bajakajian are not enough to formulate a test for excessive fines analysis in drug-related forfeitures that are neither completely punitive nor completely remedial. Civil in rem forfeiture is a multi-faceted sanction with goals and effects well beyond mere punishment, as this Court has recognized in United States v. Ursery, 518 U.S. 267, 284 (1996).

In Austin, unfettered application of the statutory law seemed to contravene fairness. As a result, this Court decided that civil asset forfeiture did have Eighth Amendment consequences if the forfeiture "can only be explained as serving in part to punish." 509 U.S. at 610. This Court declined, however, to formulate a test for when a forfeiture would be considered an excessive fine.[8]

Following Austin, Eighth Amendment excessive forfeiture analysis typically began with a basic "substantial connection" or "instrumentality" analysis, in which "the focus is on the relationship between the property and the offense, i.e., was it close enough to render the property, under

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[8] As noted in Point I above, following the Austin decision federal circuit and state courts embarked upon the assignment of creating a test to determine whether a civil in rem forfeiture encroached upon protections accorded by the Eighth Amendment Excessive Fines Clause. The results were predicably varied.

traditional standards, 'guilty' and henceforth forfeitable?" United States v. One Parcel of Property Located at 427 & 429 Hall Street, Montgomery, Montgomery County, Ala., 853 F.Supp. 1389, 1399 (M.D. Ala. 1994) (citing Austin, 509 U.S. at 626 (Scalia, J., concurring in part and concurring in the judgment). Once a clear nexus was established between the conduct giving rise to the forfeiture and the facilitative use of the property to be forfeited, the analysis then focused on the proportionality between the forfeiture and the conduct giving rise to the forfeiture.

Bajakajian addressed the question of whether an in personam, criminal forfeiture of the entire corpus of defendant's $357, 144 in currency, based upon a single violation of 31 U.S.C. § 5316, violated the Excessive Fines Clause. While recognizing that this constitutional field lay virtually unplowed, this Court established that forfeitures are fines within the scope of the Eighth Amendment if they constitute punishment for an offense. Bajakajian's offense was the failure to properly submit to the federal government a notice of his transporting currency out of the country. It did not threaten, compromise or diminish the legitimate function of the government or its citizens. In other words, the conduct was the offense.

The same cannot be said for enterprises such as illegal drug distribution. The conduct and its effects reach far beyond the offense itself. Possession and distribution of a large quantity of drugs is an offense regardless of where it occurs; they may be disguised or otherwise facilitated by the strategic use of personal or real property. Unlike the effects of Bajakajian's crime, which ended when he attempted to board his flight, drug crimes continue to adversely effect a

community long after the transaction has been completed. The actual harm and risk of harm attached to that conduct exacerbate the offense, without a correspondent enhancement of the punishment for the offense. To the extent that Bajakajian equates the gravity of the offense to the conduct surrounding the offense, it is ineffectual as an assessment tool in other types of forfeiture.

Commentators have also struggled with the importance of Bajakajian in civil forfeitures. E.g., Comment, "Forfeiture Law, The Eighth Amendment's Excessive Fines Clause, and United States v. Bajakajian," 74 Notre Dame L. Rev. 1371, 1388 (May 1999) ("Surprisingly, in a case where the Court struck down a forfeiture as unconstitutional, it might have loosened the constitutional reins on forfeiture."); Note, "United States v. Bajakajian: Will a New Standard for Applying the Excessive Fines Clause to Criminal Forfeitures Affect Civil Forfeiture Analysis?," 77 N.C. L. Rev. 1595, 1598 (April 1999) ("Although Bajakajian involved a criminal forfeiture, the holding, as well as the Court's extensive discussion distinguishing criminal and civil forfeiture, may have opened the door for courts to apply the new test in their treatment of civil forfeiture.").

When this Court, in Solem, applied the Eighth Amendment's cruel and unusual punishment prohibitions to the imposition of a non-capital sentence of imprisonment, the search was on for a proportionality test. Most of those devised since 1983 reflect Solem, which required examination of the relative gravity of the crime, the harshness of the penalty imposed, a review of the sentences imposed on other criminals in the same jurisdiction, and the sentences imposed for the commission of the same crime in other

jurisdictions. For purposes of the Solem analysis, at least in the cruel and unusual punishment arena, courts were bound to compare apples to apples, i.e., criminal sentences to criminal sentences. Such analysis fails, however, when courts compare criminal sentences to a forfeiture or other sanction that occurs outside sentencing.

Forfeitures are not part of sentences and should not be relegated to a test designed to review sentences. The theme of Solem's four-member dissent was that punishment is the province of the legislature and the domain of the trial judge, and appellate courts should be hesitant to engage in the "bald substitution of subjective moral values for those of the legislature." Solem, 463 U.S. at 314 (Burger, C.J., dissenting). "Legislatures are far better equipped than we are to balance the competing penal and public interests and to draw the essentially arbitrary lines between appropriate sentences for different crimes." Id. (citation omitted).

Eighth Amendment jurisprudence developed by this Court is unequivocal in its requirement that great deference be given to the legislature's design and the trial court's decision in a particular case. "In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." Solem, 463 U.S. at 290 n.16. While clearly groping to divine the proper application of Bajakajian, the Utah Supreme Court failed to satisfy those requirements.

The purpose of the Eighth Amendment is to limit the government's power to punish. Austin, 509 U.S. at 609.

However, this Court has never ruled that a civil in rem forfeiture of the instrumentality of a crime is barred in total by the Eighth Amendment. The Utah Supreme Court, supposing that such an outcome was required by Bajakajian, held that forfeiture of a drug dealer's home, an integral instrumentality of her drug-dealing enterprise, was barred in total by the Eighth Amendment. As the Eighth Amendment has developed into the primary constitutional curb on government action relative to forfeiture, it stands to reason that it does so only to prohibit excessive forfeitures, not all forfeitures. It is only logical that any portion of a scrutinized forfeiture that is not excessive must, therefore, be constitutionally permissible.

The Utah Supreme Court's "gross disproportionality" test relies almost exclusively on a balancing between the actual criminal sentence imposed and the value of the property to be forfeited, disregarding conduct engaged in and not criminally sentenced, but for which the claimant should be sanctioned. In essence, this reasoning provides a back door to accomplish what Ursery forbade, the prevention of subsequent civil in rem forfeiture by reference to and reliance on a collateral criminal prosecution for crimes arising from the same illegal conduct.

The Bajakajian proportionality factors, while useful and appropriate when considering forfeiture as a criminal sanction, are ill-suited when applied across the board to all civil in rem instrumentality forfeitures.

CONCLUSION

For the foregoing reasons, the State of Utah's petition for writ of certiorari should be GRANTED.

JAMES R. SOPER
Utah Solicitor General
Counsel of Record

APPENDICES

APPENDIX A

STATE of Utah, Plaintiff and Appellee,
v.
REAL PROPERTY AT 633 EAST 640 NORTH, OREM, UTAH, Defendant,
Linda Cannon, Appellant.

No. 980117.

Supreme Court of Utah.

Jan. 19, 2000.

County attorney filed action seeking forfeiture of residence pursuant to Controlled Substances Act based on alleged warehousing of illegal drugs on premises. The Fourth District Court, Provo Department I, Ray M. Harding, Sr., J., ordered forfeiture of property. Appeal was taken. The Supreme Court, 942 P.2d 925, affirmed in part and remanded in part for entry of findings of fact and conclusions of law on constitutional challenges. On remand, the District Court denied owner's request for oral argument, and signed state's proposed findings of fact and conclusions of law, and owner again appealed. The Supreme Court, Howe, C.J., held that forfeiture of residence was grossly disproportionate penalty, given small size of drug operation and relatively light sentence imposed.

Reversed.

Stewart, J., concurred in the result.

*1255 James Taylor, Laura Cabanilla, Provo, for plaintiff.

Randall Gaither, Salt Lake City, for appellant.

HOWE, Chief Justice:

¶ 1 Linda Cannon appeals from a trial court-ordered forfeiture of her real property located at 633 East 640 North in Orem, Utah (the "defendant property"), following her conviction for several drug-related offenses. She contends that the forfeiture violated constitutional prohibitions against double jeopardy and excessive fines. She also assigns as error the trial court's taking judicial notice on remand of the final disposition of criminal proceedings arising out of two later searches of the defendant property, alleging that the trial court thereby violated her constitutional due process rights.

¶ 2 This matter is before us for the second time. On Cannon's previous appeal, we remanded the case to the trial court for an entry of findings of fact and conclusions of law regarding her constitutional claims. See State v. Real Property at 633 East 640 North, Orem, Utah, 942 P.2d 925 (Utah 1997). We refer the reader to our opinion in that case for a full recitation of the relevant facts. Briefly stated, following a seizure of narcotics, drug paraphernalia, and related monies found during a warranted search (the "first warranted search"), the Utah County attorney, on behalf of the State of Utah, brought this action to forfeit the defendant property pursuant to Utah Code Ann. § 58-37-13, the Utah Controlled Substances Act ("UCSA"). In the next eighteen months, two additional searches--and additional seizures of drugs and drug paraphernalia--were conducted. A jury convicted Cannon on several drug charges stemming from

the first search. [FN1] After undergoing a sixty-day evaluation in the Utah State Prison's Diagnostic Unit, the trial court placed her on probation and ordered her to enter and complete a drug treatment program.

> FN1. Cannon was convicted of: (1) possession of marijuana with intent to distribute, a third degree felony, for which she was sentenced to prison for zero to five years; (2) possession of cocaine, a second degree felony, for which she was sentenced to one to fifteen years; (3) illegal drug tax, a third degree felony, for which she was sentenced to zero to five years; and (4) possession of drug paraphernalia, a class B misdemeanor, for which she was sentenced to not more than six months in jail. All terms were ordered to run concurrently. Additionally, Cannon was fined $2,000, and an additional $1,700 surcharge was imposed.

¶ 3 Following a hearing, the trial court ordered the forfeiture of the defendant property, valued at between $71,272.30 and $80,000. Cannon subsequently appealed the forfeiture ***1256** order to this court. We affirmed the trial court's rulings; however, we remanded the case for an entry of findings of fact and conclusions of law on the constitutional challenges so that we could address the trial court's alleged violations of Cannon's constitutional protections against excessive fines and double jeopardy.

¶ 4 On remand, both Cannon and the State filed proposed findings of fact and conclusions of law; Cannon also filed a request for oral argument. The trial court denied the request for oral argument and signed the State's findings of fact and

conclusions of law, taking judicial notice of the second and third searches of the defendant property and the resolution of resultant criminal charges against her. Cannon now appeals, claiming her state and federal constitutional due process protections [FN2] against excessive fines [FN3] and double jeopardy [FN4] have been violated.

FN2. See U.S. Const. amend. V.; Utah Const. art. I, § 7.

FN3. See U.S. Const. amend. VIII; Utah Const. art. I, § 9.

FN4. See U.S. Const. amend. V.; Utah Const. art. I, § 12.

ANALYSIS

I. FORFEITURE AS AN "EXCESSIVE FINE"

¶ 5 Cannon contends that the trial court-ordered forfeiture of her residence violated her state and federal constitutional protections against the imposition of excessive fines. However, because Cannon fails to support her state constitutional arguments with any substantive analysis, these arguments do not warrant separate analysis under the Utah Constitution. Accordingly, we decide this case on the basis of the United States Constitution alone. See State v. A House and 1.37 Acres of Real Property Located At 392 South 600 East, Nephi, Utah, 886 P.2d 534, 539 n. 7 (Utah 1994) ("Nephi "); State v. Spurgeon, 904 P.2d 220, 224 n. 2 (Utah Ct.App.1995).

¶ 6 Because the law in Utah is unsettled, our holding today sets forth the analysis for use in future forfeiture cases under the Excessive Fines Clause. In doing so, we draw upon the following cases: United States v. Bajakajian, 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998); United States v. Real Property Located in El Dorado County at 6380 Little Canyon Road, El Dorado, California, 59 F.3d 974 (9th Cir.1995); Nephi, 886 P.2d at 542 (quoting United States v. One Parcel of Real Property, located at 9638 Chicago Heights, St. Louis, 27 F.3d 327, 331 (8th Cir.1994)).

¶ 7 Before turning to Cannon's specific arguments, it is first necessary to examine the history of excessive fines analysis. The United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed...." U.S. Const. amend. VIII. The historical foundation and reasoning behind current excessive fines analysis has been well documented elsewhere; a brief history is sufficient for our purposes here. [FN5]

> FN5. For a more extensive recitation of the analytical background to excessive fines protection and forfeiture, see, generally, Nephi, 886 P.2d 534; Kristen Michelle Caione, Note, When Does In Rem Civil Forfeiture Under 21 U.S.C. 881(a)(7) Constitute an Excessive Fine?: An Overview and an Attempt to Set Forth a Uniform Standard, 47 Syracuse L.Rev. 1093 (1997).

¶ 8 In Austin v. United States, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), the United States Supreme Court held that the Excessive Fines Clause applied to drug-related forfeitures of property. Id. at 622, 113 S.Ct. 2801. The

Court, however, declined to establish a specific test to determine when a forfeiture should be considered constitutionally excessive, deciding instead to "allow the lower courts to consider that question in the first instance." Id. at 622-23, 113 S.Ct. 2801 (citations omitted). Justice Scalia proposed that the sole measure of excessiveness should be the relationship between the defendant property and the offense, i.e., the property's "instrumentality." Id. at 627-28, 113 S.Ct. 2801 (Scalia, J., concurring). The majority considered Scalia's "instrumentality test," but stated: "We do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits [lower courts] from considering other factors in determining*1257 whether the forfeiture of ... property was excessive." Id. at 623 n. 15, 113 S.Ct. 2801.

¶ 9 Since Austin, "there has been little uniformity both within and between the circuits as to the appropriate test to determine excessiveness. In order to promote uniformity, it is desirable to standardize the analysis used to determine when specific forfeitures violate the Excessive Fines Clause." Caione, supra note 5 at 1095; see also United States v. One Parcel Property located at 427 & 429 Hall St., Montgomery, Montgomery County, Ala., 853 F.Supp. 1389, 1397-98 & nn.16-19 (M.D.Ala.1994) (noting existence of cases adopting each of following tests: pure instrumentality, pure proportionality, multifactor, and a combined instrumentality and proportionality test). In United States v. Bajakajian, 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998), however, the United States Supreme Court clarified the requisite standard. Realizing the inherent subjectivity and imprecision in judicial determinations of the gravity of an

offense, and examining how the legislature has treated constitutional excessiveness in other contexts, the Court rejected a strict proportionality test in favor of a "gross disproportionality standard." Id. at 329, 118 S.Ct. 2028.

¶ 10 We have addressed the issue of forfeitures as excessive fines on only a few occasions. In the most recent instance--pre-Bajakajian--we followed the suggestion in Austin that "the connection between the defendant property and the offense is the beginning point, rather than the sole criterion, in determining whether a forfeiture is constitutionally excessive." Nephi, 886 P.2d at 542 (citation omitted). We declined to establish any further steps in the analysis, stating that as future situations arise in which an instrumentality analysis is not dispositive, we would address additional factors at that time. See id. at 542.

¶ 11 Now, the Bajakajian opinion provides us with the second prong to our excessive fines test merely hinted at in Nephi, namely, gross disproportionality. The Ninth Circuit prescribed a similar two-prong test in United States v. Real Property Located in El Dorado County at 6380 Little Canyon Road, El Dorado, California, 59 F.3d 974 (9th Cir.1995) ("6380 Little Canyon Road "). There, the court indicated that "instrumentality is a threshold test.... If the government succeeds in showing a substantial connection between the property ... and the offense, then the claimant has the burden to show that forfeiture of his property would be grossly disproportionate given the nature and extent of his criminal culpability." Id. at 985 (footnotes omitted).

[1][2] ¶ 12 We similarly hold that the threshold test in real property forfeitures [FN6] is whether the defendant property

is an instrumentality of the offense. If instrumentality is proven, we must then examine whether the ordered forfeiture is "grossly disproportionate" to the offense. However, because in the instant case we rest our decision on gross disproportionality, we will assume for purposes of discussion, but not decide, that the instrumentality test has been satisfied.

> FN6. We note that an instrumentality inquiry is not relevant in cases dealing with the forfeiture of monies. Instead, such cases are examined using solely a proportionality determination. See Bajakajian, 524 U.S. at 329 & n. 9, 118 S.Ct. 2028; United States v. $273,969.04 United States Currency, 164 F.3d 462, 466 n. 3 (9th Cir.1999).

¶ 13 We now examine whether the forfeiture is grossly disproportionate to the gravity of the offense. In Nephi, we stated: "As future cases present situations in which the instrumentality analysis is not dispositive, we can address other factors that may be comprehended by an excessive fines analysis." Nephi, 886 P.2d at 542. One of the "future cases" we foresaw is now before us. Fortunately, because of Bajakajian, we are no longer left entirely to our own devices in addressing what these "other factors" may be.

¶ 14 The Bajakajian Court clarified the excessiveness analysis, rejecting strict proportionality and adopting instead a "gross disproportionality" standard, declaring:

> In applying this standard, the district courts in the first instance, and the courts of appeals, reviewing the proportionality determination de novo, must compare the amount of the forfeiture to the gravity of ***1258** the

> defendant's offense. If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional.

524 U.S. at 331, 118 S.Ct. 2028 (footnotes omitted). This, then, provides the second prong for future excessiveness analyses.

1. The test in theory

¶ 15 The individual factors Bajakajian set forth to determine the gravity of a specific offense are those articulated in the United States Supreme Court's Cruel and Unusual Punishment Clause precedents. See Bajakajian, 524 U.S. at 330-31, 118 S.Ct. 2028 (citing Solem v. Helm, 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), overruled on other grounds by Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); [FN7] Rummel v. Estelle, 445 U.S. 263, 271, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980)). These precedents suggest that the proportionality prong of an excessiveness inquiry "should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Solem, 463 U.S. at 292, 103 S.Ct. 3001. Upon review of the Solem test, the Bajakajian court has determined and this court now determines that it is adaptable for use in forfeiture cases.

> FN7. Harmelin overrules Solem insofar as proportionality relates to an analysis under the Cruel and Unusual Punishment Clause of the Eighth Amendment. However, Bajakajian, decided seven

years after Harmelin, specifically references Solem in discussing the standard of gross disproportionality.

¶ 16 Instead of applying a strict Solem test, however, both parties have focused on a sample list of factors we cited in Nephi. Cannon asserts that these factors show the forfeiture here was grossly disproportionate to the gravity of the offense. The State uses the same factors to contend just the opposite. [FN8]

FN8. The trial court, having adopted the State's proposed findings of fact and conclusions of law as its own, addressed some of these factors and some of the Solem factors, albeit cursorily. Concerning the excessiveness issue, the trial court concluded:
6. Forfeiture of the property described in this complaint is not excessive.
a. There is a close nexus of the property to the extensive and continued criminal conduct of the claimant in this case.
b. The value of the property forfeited does not grossly exceed the potential fines and fees in this case. c. The forfeiture will not significantly impact other residents of the property since all but one have also been implicated in the criminal conduct giving rise to forfeiture.
d. The forfeiture is the result of extensive, serious conduct by the claimant which presented significant threat of harm and cost to society.
e. Forfeiture of this property does not impose hardship upon the claimant that is more extensive or severe than would have been imposed for other,

equally serious conduct, under the laws of the State of Utah.

f. Forfeiture of property established to have been an instrumentality for the sale of drugs is authorized by virtually every state and federal government.

¶ 17 The factors that we suggested in Nephi were factors the Eighth Circuit used in its excessiveness analyses. Those factors included " 'the monetary value of the property, the extent of criminal activity associated with the property, the fact that the property was a residence, the effect of forfeiture on innocent occupants of the residence, including children, or any other factors that an excessive fines analysis might require.' " Nephi, 886 P.2d at 542 (quoting United States v. One Parcel of Real Property, located at 9638 Chicago Heights, St. Louis, Missouri, 27 F.3d 327, 331 (8th Cir.1994)). The Ninth Circuit, in 6380 Little Canyon Road, utilized a similar and somewhat more expansive analysis: once the government proves instrumentality, "the claimant has the burden to show that forfeiture of his property would be grossly disproportionate given the nature and extent of his criminal culpability." 59 F.3d at 985. To determine the forfeiture's harshness, the Ninth Circuit set forth three factors: "(1) the fair market value of the property; (2) the intangible, subjective value of the property, e.g., whether it is the family home; and (3) the hardship to the defendant, including the effect of the forfeiture on defendant's family or financial condition." Id. ***1259** To determine the defendant's culpability, that court looked at:

(1) whether the owner was negligent or reckless in allowing the illegal use of his property; or

(2) whether the owner was directly involved in the illegal activity, and to what extent; and

(3) the harm caused by the illegal activity, including (a) (in the drug trafficking context) the amount of drugs and their value, (b) the duration of the illegal activity, and (c) the effect on the community.

Id. at 986.

¶ 18 We believe these factors complement the Solem test. We realize that the judicial determination of the gravity of a particular offense, as the Bajakajian Court indicated, is inherently subjective and imprecise. However, use of these factors in conjunction with the Solem test will lessen the subjectivity of the analysis, acting as effective gauges for the gravity of an offense. [FN9] Therefore, we hold that the Solem test, using the factors set forth above from Nephi and 6380 Little Canyon Road to complement the court's analysis, is the appropriate measure of excessiveness in this jurisdiction. [FN10]

> FN9. We note that none of these factors, taken individually, is dispositive. These factors should be considered and weighed together.
>
> FN10. The first two factors used in 6380 Little Canyon Road to determine culpability are more concerned with establishing instrumentality. We therefore will not include these two factors in our proportionality test.

¶ 19 One additional factor is necessary to complete an excessiveness analysis: the comparative punishment factor. "In considering an offense's gravity, the other penalties that the Legislature has authorized are certainly relevant evidence." Bajakajian, 524 U.S. at 332 n. 14, 118 S.Ct.

2028. In Bajakajian, the defendant faced a maximum fine of $250,000 plus five years' imprisonment. See id. These figures suggest, as the Court stated, that Congress, in authorizing these punishments, did not view the offense as trivial. See id. The actual sentence the defendant received was three years' probation and a $5,000 fine. See id. at 324, 118 S.Ct. 2028. The Court continued, holding that the fact that

> the maximum fine and Guideline sentence to which respondent was subject were but a fraction of the penalties authorized ... undercuts any argument based solely on the statute, because they show that respondent's culpability relative to other potential violators of the ... provision--tax evaders, drug kingpins, or money launderers, for example--is small indeed. This disproportion is telling....

Id. at 332 n. 14, 118 S.Ct. 2028. Finding disproportionality, the Court held full forfeiture would violate the Excessive Fines clause, and thereby affirmed the lower courts' rulings and rejected the Government's appeal. Id. at 335, 118 S.Ct. 2028

¶ 20 Including this factor in the final test makes sense. After all, two separate individuals, convicted of an "identical" crime may receive vastly different sentences based on inherently individualized facts. During sentencing, the defendant's culpability is evaluated, and punitive measures are meted out accordingly. The harsher the sentence, fines, and penalties a defendant receives, the less likely it is that a forfeiture may be grossly disproportionate. If a defendant receives only a small percentage of the "maximum" possible penalty, it is more likely--although still not dispositive-- that the forfeiture may be constitutionally excessive.

[3][4][5] ¶ 21 In short, a court must look at four main factors:

(1) the gravity of the particular offense;

(2) the harshness of the forfeiture;

(3) the sentences imposed on other criminals in the same jurisdiction; and

(4) the sentences imposed for commission of the same crime in other jurisdictions.

In gauging the gravity of the offense (factor (1) above), a court should take into consideration:

(a) the harm caused by the illegal activity, including (i) (in the drug trafficking context) the amount of drugs and their value, (ii) the duration of the illegal activity, and (iii) the effect on the community; and

***1260** (b) the actual sentence the defendant received as a result of the offense compared to the maximum punishments authorized.

In judging the harshness of the forfeiture (factor (2) above), a court should look at:

(a) the fair market value of the property;

(b) the intangible, subjective value of the property, e.g., whether it is the family home; and

(c) the hardship to the defendant, including the effect of the forfeiture on defendant's family or financial condition.

2. The test as applied to the instant case

[6][7] ¶ 22 Factual findings made by trial courts in conducting excessiveness inquiries must be accepted unless clearly erroneous. See Bajakajian, 524 U.S. at 331 n. 10, 118 S.Ct. 2028 (citing Anderson v. Bessemer City, 470 U.S. 564, 574-75, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)). However, the question of whether a fine is constitutionally

excessive requires the application of a constitutional standard to the facts of the individual case. In that context, de novo review of the question is appropriate. See id. (citing Ornelas v. United States, 517 U.S. 690, 697, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)).

[8] ¶ 23 The police seized from the defendant property less than two pounds of marijuana in three searches within eighteen months, with a street value of approximately $7,200. The trial court found that "[f]orfeiture of this real property has served a remedial purpose of removing this drug house from the stream of narcotic commerce, thereby serving the public by removing a drug safehouse from its ongoing criminal use, and by cleansing the site of significant and ongoing drug distribution activities." The trial court concluded that the "forfeiture is the result of extensive, serious conduct by the claimant [Cannon] which presented significant threat of harm and cost to society."

¶ 24 We do not condone any degree of drug trafficking; we recognize the great cost the State incurs in investigating, pursuing, and convicting offenders. We also understand the broad-scale effect of drug trafficking on society. As the trial court observed: "The use and sale of controlled substances is one of the single most serious factors affecting and utilizing the resources" of the courts and the criminal justice system, both on the state and federal level. However, these findings and conclusions are not sufficient to support this forfeiture in view of other factors.

¶ 25 Measured by any standard, Cannon's drug operation was small, involving possession of less than two pounds of marijuana for sale in an eighteen month span. The trial court

apparently agreed with this assessment at the time of trial when Cannon was placed on probation, although a jury had found her guilty of three felonies and a misdemeanor on charges stemming from the first search of her home. See supra note 1. The court allowed her to remain on probation after being convicted of an additional felony resulting from the second search. Cannon's actual fines and surcharges imposed on the charges of which she was convicted arising out of the first and second searches [FN11] totaled only $4,625. Cannon was also subject to $5,035.10 as a tax or penalty for possessing nonstamped illegal drugs. In sum, the actual fines, surcharges, and penalties imposed amounted to $9,660.10.

> FN11. Charges arising out of the third search were dismissed.

¶ 26 The State argues that Cannon faced "maximum possible penalties" of approximately $130,425 and "substantial" prison time. It repeatedly stresses these "maximum possible penalties," contending that these amounts should be used for measurement, as opposed to the actual penalties. The trial court also used these theoretical figures extensively in addressing the gravity of Cannon's offenses in its findings of fact and conclusions of law. The trial court on remand declared simply that the "value of the property forfeited does not grossly exceed the potential fines and fees in this case."

¶ 27 The State argues that this fact alone shows that the forfeiture is not grossly disproportionate. However, the State does not provide any legal support for its comparison of theoretical maximum penalties with the ***1261** value of the forfeited property. [FN12] While reference to the maximum

penalties is helpful in determining the gravity of the offenses, it has limited relevance in determining proportionality. Here, the trial court placed too much reliance on the maximum penalties in its analysis of proportionality instead of focusing on the actual fines and penalties imposed.

> FN12. In fact, at oral argument, upon being asked whether there was case law from which they derived this test, counsel for the State admitted that "I'm not sure that we relied on a case when we came up with our idea. I think that was just something we thought of."

¶ 28 When we compare the (1) gravity of Cannon's conduct; (2) the actual fines, surcharges, and penalties of $9,660.10 imposed; and (3) her probation on the prison and jail sentences, with the value of the forfeited real property at approximately $80,000, we must conclude that there is a gross disproportionality here under the standards set forth in Bajakajian, and the forfeiture cannot be sustained.

II. JUDICIAL NOTICE AS DUE PROCESS VIOLATION

¶ 29 Cannon contends that the trial court violated her due process rights by taking judicial notice of the second and third searches of the defendant property as well as the resolution of criminal charges stemming from the second search. It is unnecessary to reach this question. In our above analysis of disproportionality, we have considered the controverted evidence regarding the second and third searches, but determined that the totality of all evidence does not raise Cannon's offenses to a level sufficient to overcome the disproportionality.

¶ 30 We additionally do not need to reach Cannon's contention regarding double jeopardy.

CONCLUSION

¶ 31 Based upon the foregoing analysis, we conclude that assuming the house was an instrumentality of the defendant's drug offenses, the second prong of the "excessive fine" analysis is not met. The forfeiture of the defendant property is grossly disproportionate. Having decided the case on this basis, appellant's other arguments on appeal are rendered moot.

¶ 32 Judgment reversed.

¶ 33 Associate Chief Justice DURHAM, Justice ZIMMERMAN, and Justice RUSSON concur in Chief Justice HOWE's opinion.

¶ 34 Justice STEWART concurs in the result.

APPENDIX B

STATE of Utah, Plaintiff and Appellee,
v.
REAL PROPERTY AT 633 EAST 640 NORTH, OREM, Utah, Defendant.
Linda Cannon, Appellant.

No. 950459.

Supreme Court of Utah.

July 22, 1997.

County attorney filed action seeking forfeiture of residence pursuant to Controlled Substances Act based on alleged warehousing of illegal drugs on premises. The District Court, Provo Dep't I, Ray M. Harding, Sr., J., ordered forfeiture of property. Appeal was taken. The Supreme Court, Zimmerman, C.J., held that: (1) evidence supported finding that street value of marijuana seized from residence exceeded $1000 statutory threshold for forfeiture of residence; (2) street address of residential property was adequate description of that property for forfeiture purposes; (3) evidence of subsequent seizures of controlled substances at property was relevant to question of whether property was used to warehouse controlled substances; (4) considering fact that forfeiture proceeding was bench trial, trial court did not act unreasonably or abuse its discretion in finding that danger of unfair prejudice to claimant from allowing judge to consider evidence of subsequent searches and seizures of controlled substances at property was not substantially outweighed by probativeness of that evidence; and (5)

remand was required for trial court to make findings of fact or conclusions of law respecting claims of double jeopardy and excessive fine.

Affirmed in part and remanded in part.

Payne, District Judge, filed opinion concurring in the result.

***927** Jan Graham, Att'y Gen., Salt Lake City, and James R. Taylor, Provo, for plaintiff and appellee..

Randall T. Gaither, Salt Lake City, for defendant.

ZIMMERMAN, Chief Justice:

Claimant Linda Cannon appeals from a trial court order forfeiting her interest in real property located at 633 East 640 North in Orem, Utah. The trial court ordered forfeiture of the property under the Utah Controlled Substances Act, section 58-37-13 of the Utah Code, because officers of the Utah County Sheriff's Department seized a one-pound brick of marijuana during a warranted search of the property. Cannon claims that the property was not properly subject to forfeiture because the State failed to offer any evidence to meet several of the statutory elements that must be met before forfeiture is appropriate. Cannon also claims that the trial court erred when it allowed the State to present evidence of subsequent searches at the residence during which officers seized more narcotics. Last, Cannon claims that the trial court failed to enter findings of fact or conclusions of law regarding the constitutional challenges she made to the forfeiture statute. We affirm in part and reverse and remand with instructions to

the trial court to enter findings of fact and conclusions of law regarding Cannon's constitutional claims.

We begin by reviewing the facts. On January 15, 1993, Utah County Narcotics Task Force officers conducted a warranted search at a residence located at 633 East 640 North in the city of Orem. During the search, officers seized approximately one pound of marijuana, some cocaine, and several sets of scales. Officers also seized bills with serial numbers that matched the previously recorded serial numbers of money used to make three controlled buys. The controlled buys were, in part, the basis for obtaining the search warrant executed on January 15th. The officers also seized marijuana ashes, stems, residue, and paraphernalia, including a roach clip, a pipe, several partially smoked marijuana cigarettes, and some rolling papers.

As a result of these seizures, the Utah County Attorney filed a verified complaint on July 21, 1993, requesting forfeiture of the property pursuant to the Utah Controlled Substances Act, section 58-37-13 of the Code. On September 8, 1993, officers searched the residence again and seized approximately one-quarter of a pound of marijuana as well as another set of scales. Again, on June 24, 1994, officers searched the residence and once again seized marijuana, cocaine, and methamphetamine, as well as another set of scales. After a bench trial, the court entered its memorandum decision and findings of fact, order, and satisfaction of judgment, granting all right, title, and interest in the property to the State. Following various post-trial motions and hearings, the court's order became final on September 22, 1995, and Cannon appealed to this court.

The first issue is the sufficiency of the State's proof of some of the statutory elements necessary to warrant forfeiture of property under the Controlled Substances Act. Cannon claims that the State failed to offer evidence to prove (i) that the street value of the drugs seized exceeded $1,000; (ii) the precise property description of the real estate sought to be forfeited; (iii) the identity of the property owner and his or her ***928** knowledge of or consent to the illegal activity at the property; and (iv) the nexus between the property and the narcotics. See Utah Code Ann. § 58-37-13; see also State v. A House & 1.37 Acres of Real Property Located at 392 S. 600 E., Nephi, Utah, 886 P.2d 534 (Utah 1994). We address each element in order.

As to the first element, the so-called "street value" of the narcotics, section 58-37-13 of the Code provides various categories of forfeitable property, among them real property used as a "housing, warehousing, or storage facility" for controlled substances. Utah Code Ann. § 58-37-13(1)(i)(iii). [FN1] The statute also fixes conditions that must be met for any such forfeiture. One such condition is that the "street value of any controlled substances found on the premises at any given time [must] total[ ] or exceed [ ] $1,000." Id. Cannon argues that the State failed to prove that the street value of the marijuana seized from the property on January 15, 1993, totaled or exceeded $1,000. The trial court specifically found that "the evidence presented showed that the street value of the controlled substances 'warehoused' was in excess of the $1,000.00 threshold."

> FN1. This section was amended in 1996, but the portions referred to in this opinion were simply renumbered by that amendment. See ch. 294, 1996

Utah Laws 1482-88 (codified as amending Utah Code Ann. § 58-37-13) (effective April 29, 1996). Subsequent references in this opinion are to the statute as it was numbered prior to the 1996 amendment.

[1][2] Because this is a finding of fact, we overturn the trial court's finding only if it is "not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination." State v. Pena, 869 P.2d 932, 935-36 (Utah 1994) (citing Wessel v. Erickson Landscaping Co., 711 P.2d 250, 252 (Utah 1985)). We conclude that the evidence in this case adequately supports the trial court's finding. Officer Lee R. Fox of the Utah County Sheriff's Department testified that the street value of a gram of marijuana was ten dollars and that the 453.6 grams of marijuana found at the residence would be worth approximately $4,536. Although Cannon points to evidence in the record that a bulk one-pound brick of marijuana could be bought for $800 to $900, this is simply an attempt to reargue the evidence presented to the trial court. Clearly, Officer Fox's testimony is sufficient to support the trial court's finding.

[3] Cannon next argues that the State failed to introduce evidence as to the precise description of the property. While the statute is silent as to how property sought to be seized must be described, Cannon contends that the description must be a proper legal description, either as metes and bounds or by plat map. Here, the State described the real property only by its street address. The verified complaint identifies the property subject to forfeiture as "Residence located at 633 East 640 North, Orem, Utah." We find ample

case law to support the State's position that, in the ordinary case, the street address of a residential property is an adequate description of that property for forfeiture purposes. In Park West Village, Inc. v. Avise, this court held that a metes and bounds description was not necessary in an option contract where the street address raised "no serious question ... at trial as to the boundaries of the [property]." 714 P.2d 1137, 1141 (Utah 1986). We have held similarly in several other cases. See Hackford v. Snow, 657 P.2d 1271, 1276 (Utah 1982) (description of property by name "Hackford Farm" in lease/option contract was sufficient to justify specific performance); Reed v. Alvey, 610 P.2d 1374, 1377 (Utah 1980) (description of property as "corner of Hillview and Ninth East" along with extrinsic evidence was sufficient to justify specific performance of realty sale contract). In this case, as in those, no serious question was raised at trial as to the description of the property, and Cannon points to no ambiguity of reference in the description. We see no reason to impose a special requirement in forfeiture cases that does not apply in other situations where the street address unambiguously points out the subject property. The description of the property in this case was sufficient to meet the statutory requirements.

***929** Cannon next claims that the State did not prove in its case-in- chief (i) the existence of any interest in real property to be forfeited, i.e., the State did not introduce any evidence of the title status of the property; and (ii) that Cannon knew of or consented to the illicit use of the property or that there was any nexus between the property and the illicit use. Cannon contends that these are essential elements of a forfeiture case under the statute and that they must be proven by the State to make a prima facie case for forfeiture.

[4] The procedural history of the trial proceedings is relevant to this claim. At the close of the State's case-in-chief, Cannon moved for a directed verdict based on this asserted failure of proof. The trial court took the motion under advisement and allowed Cannon to present her case-in-defense. In laying a foundation for her constitutional claims, Cannon put on evidence of her conviction on drug charges arising out of the January 15, 1993, warranted search that provided the basis for the forfeiture action. Cannon also presented evidence of her ownership of the property in question and testified that she knew of the presence of the marijuana that was seized on January 15th. Cannon further testified that she knew of prior drug sales by a resident of the house. In other words, Cannon put in proof of her interest in the property, her knowledge of or consent to the property's illicit use, and the nexus between the property and the drug activity, all the points she claims were lacking in the State's case-in-chief.

Cannon argues that, upon a motion for a directed verdict at the close of the State's case, the court had a duty to rule on that motion in light of the evidence the State had offered and the statutory elements on which it bore the burden of proof. By implication, she asks this court to ignore the evidence that she introduced in her defense after the trial court took her motion for a directed verdict under advisement. This argument, however, ignores the settled law of directed verdicts. "A motion for a directed verdict is a method of testing the legal sufficiency of the evidence...." See 75A Am.Jur.2d Trial § 907 (1991). A defendant may move for a directed verdict at the close of the plaintiff's case, asserting that the plaintiff has produced no evidence on a necessary element of the plaintiff's case as to which the plaintiff bears

the burden of proof. Id. § 943. Upon receiving a motion for a directed verdict at the close of the plaintiff's case, however, the trial court has the discretion to reserve its ruling until it has heard the defendant's evidence. Id. § 952. The defendant making the motion for directed verdict does not thereby waive her right to produce evidence tending to prove her case, but she does run the risk of producing evidence tending to prove elements of the plaintiff's case that may not have been proven at the time the motion for directed verdict was made. Id. § 961. This is precisely what happened in the instant case. Therefore, we need not decide here whether the State must prove knowledge of or consent by the owner as contended for by Cannon, since she supplied evidence of her knowledge and consent.

Cannon's next claim is that the trial court erred when it allowed the State to present evidence of the two subsequent searches and resulting seizures of controlled substances. Cannon bases her claim on the fact that property is not subject to forfeiture under the "warehousing" provision unless the street value of controlled substances "found on the premises at any given time totals or exceeds $1,000." Utah Code Ann. § 58-37-13(1)(i)(iii) (emphasis added). Because the State's forfeiture action must be based only on the January 15, 1993, seizure, Cannon argues that it was error under Utah Rules of Evidence 401, 402, and 403 for the trial court to allow the State to present evidence of the subsequent searches and seizures. She claims that the evidence's probative value was substantially outweighed by the danger of unfair prejudice. We reject both claims.

[5][6] Trial courts have wide latitude in making determinations of relevance, probativeness, and prejudice

under rules 401 and 403. See Pena, 869 P.2d at 938; see also Harline v. Barker, 912 P.2d 433, 441 (Utah 1996) (probativeness and prejudice). We begin with Cannon's claim that the evidence of additional seizures was not relevant. Rule 401 defines relevant evidence as "evidence ***930** having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Utah R. Evid. 401. Evidence of subsequent seizures of controlled substances at the property is relevant to the question of whether the property was used to "warehouse" controlled substances. At trial, one of Cannon's main claims was that the one-pound brick of marijuana could have been intended solely for the personal use of the residents of the house and thus was not "warehoused" on the property. Evidence of subsequent seizures was therefore relevant to meet the statutory requirement that the drugs be "warehoused" on the property before it is subject to forfeiture. Utah Code Ann. § 58-37-13(1)(i)(iii). Therefore, the trial court did not abuse its discretion in finding the evidence relevant.

[7] Moving on to Cannon's claims that the evidence should have been excluded under rule 403 as substantially more prejudicial than probative, we note the deferential standard of review:

> "In reviewing a trial court's ruling on the admissibility of evidence under rule 403, we will not overturn the court's determination unless it was an 'abuse of discretion.' " State v. Hamilton, 827 P.2d 232, 239 (Utah 1992). Thus, we must decide "whether, as a matter of law, the trial court's decision that 'the unfairly prejudicial potential of the evidence outweighs [or does not outweigh] its

probativeness' was beyond the limits of reasonability." Id. at 239-40 (alteration in original) (quoting State v. Ramirez, 817 P.2d 774, 781-82 n. 3 (Utah 1991)).

Harline, 912 P.2d at 441. In this case, the trial court essentially ruled that the probativeness of the State's evidence of subsequent searches and seizures of controlled substances at the subject property was not substantially outweighed by any danger of unfair prejudice. We find the trial court's ruling not to have been "beyond the limits of reasonability." Id.

[8] The State offered the evidence of subsequent seizures to prove that the property was being used to warehouse controlled substances. When weighing the probativeness of the evidence against the possible prejudice, we must take into consideration the fact that the trial was to the bench, not to a jury. The evil that rule 403 is intended to combat, unfair prejudice, is primarily of concern during a jury trial. Rule 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of ... misleading the jury...." Utah R. Evid. 403. As we noted in State v. Featherson:

> [T]he judge in a bench trial, ... acting as a trier of fact, is presumably less likely than a jury to be prejudiced by evidence of prior crimes, wrongs, or acts.... "[B]ecause it can be safely assumed that the trial court will be somewhat more discriminating in appraising both the competency and the effect properly to be given evidence, the rulings on evidence are looked upon with a greater degree of indulgence when the trial is to the court than when it is to the jury."

781 P.2d 424, 431 (Utah 1989) (quoting State v. Park, 17 Utah 2d 90, 404 P.2d 677, 679 (1965)); see also State v.

Rimmasch, 775 P.2d 388, 407 (Utah 1989). Given that this was a bench trial, the trial court was not unreasonable in finding that the danger of unfair prejudice to Cannon from allowing the judge to consider evidence of subsequent searches and seizures of controlled substances at the property was not substantially outweighed by the probativeness of that evidence. Absent an abuse of discretion, we find no reason to disturb the trial judge's ruling admitting the evidence.

[9] Cannon's last claim on this appeal is that the trial court failed to make findings of fact or conclusions of law respecting two constitutional challenges she raised. These were claims of double jeopardy and an excessive fine. These issues were both raised repeatedly in Cannon's answer to the verified complaint, by Cannon's presenting evidence at trial, in Cannon's post- trial memorandum, and again in her objections to the findings and motion for new trial. Further, after the trial, Cannon specifically brought the court's attention to the need for it to make written findings of fact and conclusions of law on ***931** these issues. Despite all these efforts to obtain a ruling, the trial court failed to make any findings as to the proportionality of the forfeiture to the severity of the offense or to state any conclusions of law as to the issues of double jeopardy or excessive fines. In Butler, Crockett & Walsh Development Corp. v. Pinecrest Pipeline Operating Co., we noted that trial courts may not decline to rule on issues properly presented for decision:

> "Failure of the trial court to make findings on all material issues is reversible error unless the facts in the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.' The findings of fact must show that the court's judgment or decree 'follows logically from, and is supported by, the evidence.' The findings

'should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.' "

909 P.2d 225, 231 (Utah 1995) (quoting Acton v. J.B. Deliran, 737 P.2d 996, 999 (Utah 1987) (citations omitted)); see also Fernandez v. Utah Transit Auth., No. 960520 (Utah Sup.Ct. Order of Jan. 8, 1997) ("The trial court does not have the discretion to decline to decide a legal question properly presented to it."). Because of the trial court's failure to rule on these issues, we are faced with addressing those issues without the necessary factual findings and without the factual context crucial to such constitutional determinations. Therefore, we remand the case to the trial court on these issues to make the necessary findings and conclusions.

We affirm the trial court's rulings on the motion for a directed verdict and admission of evidence of subsequent searches and seizures. We remand the case for entry of findings and conclusions as to the constitutional issues Cannon raised below, which were not addressed by the trial court.

HOWE, DURHAM and RUSSON, JJ., concur.

Having disqualified himself, STEWART, Associate C.J., does not participate herein; A. LYNN PAYNE, District Judge, sat.

PAYNE, District Judge, concurring in the result:

At the conclusion of the State's case-in-chief, Cannon moved for dismissal on the ground that the State had failed to prove a prima facie case. Utah R. Civ. P. 41(b). [FN1] One of the

facts which Cannon claimed the State had not proved was that the property owner knew about or consented to the illicit use of the property. By raising this issue in the context of a motion to dismiss, Cannon contends that the State bears the burden of proving knowledge or consent in a forfeiture action brought under section 58-37-13(1)(i). Rather than addressing the issue of whether the State bears a burden of proving knowledge or consent, the majority merely concludes that the State met its burden of proving a prima facie case through Cannon's introduction of evidence in her case-in-chief. By failing to address the issue, the majority leaves intact the prior statement of this court that the State bears a burden to prove "the owner of the property interest knew about or willingly consented to the act which made the property subject to forfeiture" in order to prove a forfeiture under Utah Code Ann. § 58-37-13(1)(i). State v. 392 South 600 East, Nephi, 886 P.2d 534, 538 (Utah 1994) (emphasis added). I write separately because I believe that the statute does not place any such burden upon the State.

> FN1. Utah Rule of Civil Procedure 41(b) states:
> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the Plaintiff has shown no right to relief....
> A prima facie case is proven when evidence has been introduced which, in the absence of contrary evidence, would entitle the party with the burden of proof to judgment as a matter of law. State v. Brady, 91 N.W. 801, 805 (Iowa 1902), quoted in State v.

> Wood, 2 Utah 2d 34, 38, 268 P.2d 998, 1001 (1954). Therefore, the State's failure to prove a prima facie case would entitle Cannon to dismissal under rule 41(b).

It is axiomatic that the State need not introduce evidence in its case- in-chief that is ***932** not required to establish the cause of action. The relevant portions of the forfeiture statute in effect at the time provided:

> (1) The following are subject to forfeiture, and no property right exists in them:
> ...;
> (i) all warehousing, housing, and storage facilities, or interest in real property of any kind used, or intended for use, in producing, cultivating, warehousing, storing, protecting, or manufacturing any controlled substances in violation of this chapter, except that:
> ...;
> (ii) an interest in property may not be forfeited under this subsection if the holder of the interest did not know of the act which made the property subject to forfeiture, or did not willingly consent to the act; and
> (iii) unless the premises are used in producing, cultivating, or manufacturing controlled substances, a housing, warehousing, or storage facility or interest in real property may not be forfeited under this section unless cumulative sales of controlled substances on the property within a two-month period total or exceed $1,000, or the street value of any controlled substances found on the premises at any given time totals or exceeds $1,000.

Utah Code Ann. § 58-37-13(1)(i)(i)-(iii). [FN2] In addition to the statutory requirements, case law mandates that the State prove that forfeiture would not violate the Eighth

Amendment's Excessive Fines Clause. Austin v. United States, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993); Nephi, 886 P.2d at 541.

> FN2. This section has been amended since the date of this incident. The current forfeiture provision is found in section 58-37-13(2)(i).

However, neither the statute nor the Eighth Amendment requires the State to prove knowledge or consent. Indeed, the only reference in the statute to knowledge or consent is found in subsection (ii), which affords an exception to forfeiture where the property owner "did not know of the act which made the property subject to forfeiture, or did not willingly consent to the act." Utah Code Ann. § 58-37-13(1)(i)(ii) (emphasis added). [FN3] The Nephi court correctly referred to this language as affording a property owner an "innocent-owner defense":

> FN3. The current version of the statute similarly requires proof that the property owner "did not know or have reason to know of the conduct which made the property subject to forfeiture, or did not willingly consent to the conduct." Utah Code Ann. § 58-37-13(2)(i)(ii).

We are persuaded that the analysis in Austin applies equally to section 58-37-13(1)(i). As pointed out in Austin, "forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence." In addition, as was true of the federal statutes at issue in Austin, section 58-37-13(1)(i) contains an "innocent-owner" defense.

Nephi, 886 P.2d at 540 (emphasis added) (citation omitted) (quoting Austin, 509 U.S. at 622 n. 14, 113 S.Ct. at 2812 n. 14). Because the exception is an affirmative defense, it must be raised and proved by the property owner who claims the exception, not by the State. Neither the Eighth Amendment nor any other constitutional provision requires the State to prove knowledge or consent. See, e.g., Bennis v. Michigan, --- U.S. ----, ----, 116 S.Ct. 994, 998, 134 L.Ed.2d 68 (1996) ("[A] long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."). [FN4] Nor has Cannon argued that ***933** proof of knowledge or consent is constitutionally required to establish a forfeiture under section 58-37-13(1)(i).

> FN4. In Bennis, the co-owner husband used the family car to engage in sexual acts with a prostitute. The car was forfeited under a Michigan statute as a public nuisance, even though the co-owner wife did not know of or consent to the misuse of the car. The Michigan statute did not require the state to prove knowledge or consent as a condition for forfeiture, nor did the statute allow the property owner to interpose an innocent-owner defense. Although the trial court possessed equitable powers to award one-half of the proceeds after sale to an innocent co-owner, the trial judge in Bennis did not exercise this equitable power. Therefore, the wife did not receive any portion of the proceeds from the sale of her car. The co-owner wife argued that she was constitutionally entitled to an innocent- owner defense where she was not aware of the use which

> subjected her car to forfeiture--a right which is statutorily provided to an innocent owner in Utah where the owner "did not know of the act which made the property subject to forfeiture, or did not willingly consent to the act." Utah Code Ann. § 58-37-13(1)(i)(ii). The Supreme Court found no constitutional infirmity in Michigan's failure to allow an innocent-owner defense.

The Nephi court's statement that section 58-37-13(1)(i) requires the State to prove that a property owner "knew about or willingly consented to the act which made the property subject to forfeiture" is clearly an inaccurate statement of the statutory requirements for forfeiture. The legislature did not require proof that a property owner "knew about or willingly consented to the act which made the property subject to forfeiture." It required the exact opposite (proof that the property owner "did not know" or "did not willingly consent" to the act which made the property subject to forfeiture). The Nephi court's interpretation of the statute reads the word "not" out of the statute and incorrectly imposes a burden upon the State to prove knowledge or consent. This is inconsistent with the clear and unambiguous language of the statute.

The circumstances where a property owner did not know about the use of the property or did not willingly consent to its use are clearly identified as exceptions to forfeiture. Placing a burden of proving knowledge or consent on the State is therefore inconsistent with the clear and unambiguous language of the statute. Placing a burden of proof on the State is likewise inconsistent with the notion that one who claims an exception to a general rule must bear the

burden of proving that he or she comes within the exception. Therefore, I would conclude that the State does not bear any burden to prove knowledge or consent as a prerequisite to forfeiture under section 58-37-13(1)(i). Knowledge and consent become relevant only if the property owner raises the innocent-owner defense; in which case, the property owner must bear the burden of proving that he or she "did not know" or "did not willingly consent."

Because there is no statutory or constitutional requirement that the State introduce evidence concerning knowledge or consent, I would hold that the exception to forfeiture provided by subsection (i)(ii) is an affirmative defense that must be raised and proved by Cannon. Nevertheless, because the majority sustained the trial court on other grounds, I concur in the result.

APPENDIX C

UTAH CODE, 1953
TITLE 58. OCCUPATIONS AND PROFESSIONS
CHAPTER 37. CONTROLLED SUBSTANCES
Copyright
(C) 1953, 1960-1963, 1966, 1968-1971, 1973, 1974, 1976-19
78, 1981,
1982, 1984 by The Allen Smith Company; Copyright
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Company. All rights reserved.

58-37-13 Property subject to forfeiture -- Seizure -- Procedure.

(1) The following are subject to forfeiture and no property right exists in them:

(a) all controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this chapter;

(b) all raw materials, products, and equipment of any kind used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this chapter;

(c) all property used or intended for use as a container for property described in Subsections (1)(a) and (1)(b);

(d) all hypodermic needles, syringes, and other paraphernalia, not including capsules used with health food supplements and herbs, used or intended for use to administer controlled substances in violation of this chapter;

(e) all conveyances including aircraft, vehicles, or vessels used or intended for use, to transport, or in any manner

facilitate the transportation, sale, receipt, simple possession, or concealment of property described in Subsections (1)(a) and (1)(b), except that:

(i) a conveyance used by any person as a common carrier in the transaction of business as a common carrier may not be forfeited under this section unless it appears that the owner or other person in charge of the conveyance was a consenting party or privy to violation of this chapter;

(ii) a conveyance may not be forfeited under this section by reason of any act or omission committed or omitted without the owner's knowledge or consent; and

(iii) any forfeiture of a conveyance subject to a bona fide security interest is subject to the interest of a secured party who could not have known in the exercise of reasonable diligence that a violation would or did take place in the use of the conveyance;

(f) all books, records, and research, including formulas, microfilm, tapes, and data used or intended for use in violation of this chapter;

(g) everything of value furnished or intended to be furnished in exchange for a controlled substance in violation of this chapter, all proceeds traceable to any violation of this chapter, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this chapter; but:

(i) an interest in property may not be forfeited under this subsection if the holder of the interest did not know of the act which made the property subject to forfeiture, or did not willingly consent to the act; and

(ii) there is a rebuttable presumption that all money, coins, and currency found in proximity to forfeitable controlled substances, drug manufacturing or distributing paraphernalia, or to forfeitable records of the importation,

manufacture, or distribution of controlled substances are forfeitable under this section; the burden of proof is upon claimants of the property to rebut this presumption;

(h) all imitation controlled substances as defined in Section 58-37b-1, Imitation Controlled Substances Act;

(i) all warehousing, housing, and storage facilities, or interest in real property of any kind used, or intended for use, in producing, cultivating, warehousing, storing, protecting, or manufacturing any controlled substances in violation of this chapter, except that:

(i) any forfeiture of a housing, warehousing, or storage facility or interest in real property is subject to the bona fide security interest of a party who could not have known in the exercise of reasonable diligence that a violation would take place on the property;

(ii) an interest in property may not be forfeited under this subsection if the holder of the interest did not know of the act which made the property subject to forfeiture, or did not willingly consent to the act; and

(iii) unless the premises are used in producing, cultivating, or manufacturing controlled substances, a housing, warehousing, or storage facility or interest in real property may not be forfeited under this section unless cumulative sales of controlled substances on the property within a two-month period total or exceed $1,000, or the street value of any controlled substances found on the premises at any given time totals or exceeds $1,000. A narcotics officer experienced in controlled substances law enforcement may testify to establish the street value of the controlled substances for purposes of this subsection; and

(j) any firearm, weapon, or ammunition carried or used during or in relation to a violation of the Utah Controlled Substances Act, the Utah Drug Paraphernalia Act, or the.

Utah Controlled Substances Precursor Act or any firearm, weapon, or ammunition kept or located within the proximity of controlled substances or other property subject to forfeiture under any of those acts.

(2) Property subject to forfeiture under this chapter may be seized by any peace officer of this state upon process issued by any court having jurisdiction over the property. However, seizure without process may be made when:

(a) the seizure is incident to an arrest or search under a search warrant or an inspection under an administrative inspection warrant;

(b) the property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding under this chapter;

(c) the peace officer has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(d) the peace officer has probable cause to believe that the property has been used or intended to be used in violation of this chapter.

(3) In the event of seizure under Subsection (2), proceedings under Subsection (4) shall be instituted promptly.

(4) Property taken or detained under this section is not repleviable but is in custody of the law enforcement agency making the seizure, subject only to the orders and decrees of the court or the official having jurisdiction. When property is seized under this chapter, the appropriate person or agency may:

(a) place the property under seal;

(b) remove the property to a place designated by it or the warrant under which it was seized; or

(c) take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(5) All substances listed in Schedule I that are possessed, transferred, distribution, or offered for distribution in violation of this act are contraband and shall be seized and summarily forfeited to the state. Similarly, all substances listed in Schedule I which are seized or come into the possession of the state are contraband and shall be summarily forfeited to the state if the owners are unknown.

(6) All species of plants from which controlled substances in Schedules I and II are derived which have been planted or cultivated in violation of this chapter, or of which the owners or cultivators are unknown, or are wild growths, may be seized and summarily forfeited to the state.

(7) Failure, upon demand by the department or its authorized agent, of any person in occupancy or in control of land or premises upon which species of plants are growing or being stored, to produce an appropriate license or proof that he is the holder of a license, is authority for the seizure and forfeiture of the plants.

(8) When any property is forfeited under this chapter by a finding of the court that no person is entitled to recover the property, it shall be deposited in the custody of the Division of Finance. Disposition of all property is as follows:

(a) The state may include in its complaint seeking forfeiture, a request that the seizing agency be awarded the property. Upon a finding that the seizing agency is able to use the forfeited property in the enforcement of controlled substances laws, the court having jurisdiction over the case shall award the property to the seizing agency. The seizing agency shall pay to the prosecuting agency the legal costs incurred in filing and pursuing the forfeiture action. Property forfeited under this section may not be applied by the court to costs or fines assessed against any defendant in the case.

(b) The seizing agency, or if it makes no application, any

state agency, bureau, county, or municipality, which demonstrates a need for specific property or classes of property subject to forfeiture shall be given the property for use in enforcement of controlled substances laws upon the payment of costs to the county attorney or, if within a prosecution district, the district attorney for legal costs for filing and pursuing the forfeiture and upon application for the property to the director of the Division of Finance. The application shall clearly set forth the need for the property and the use to which the property will be put.

(c) The director of the Division of Finance shall review all applications for property submitted under Subsection (8)(b) and, if the seizing agency makes no application, make a determination based on necessity and advisability as to final disposition and shall notify the designated applicant or seizing agency, where no application is made, who may obtain the property upon payment of all costs to the appropriate department. The Division of Finance shall in turn reimburse the prosecuting agency or agencies for costs of filing and pursuing the forfeiture action, not to exceed the amount of the net proceeds received for the sale of the property. Any proceeds remaining after payment shall be returned to the seizing agency or agencies.

(d) If no disposition is made upon an application under Subsection (8)(a) or (b), the director of the Division of Finance shall dispose of the property by public bidding or as considered appropriate, by destruction. Proof of destruction shall be upon oath of two officers or employees of the department having charge of the property, and verified by the director of the department or his designated agent.

(9) When any property is subject to forfeiture, a determination for forfeiture to the state shall be made as follows:

(a) A complaint verified on oath or affirmation shall be prepared by the county attorney, or if within a prosecution district, the district attorney where the property was seized or is to be seized. The complaint shall be filed in the circuit or district court if the property is not real property and the value is less than $10,000. The complaint shall be filed in the district court if the value of property other than real property is $10,000 or more or the property is real property. If the complaint includes property under the jurisdiction of the circuit court and also property under the exclusive jurisdiction of the district court, the complaint shall be filed in the district court. The complaint shall describe with reasonable particularity:

(i) the property which is the subject matter of the proceeding;

(ii) the date and place of seizure, if known; and

(iii) the allegations which constitute a basis for forfeiture.

(b) Upon filing the complaint, the clerk of the court shall forthwith issue a warrant for seizure of the property which is the subject matter of the action and deliver it to the sheriff for service, unless the property has previously been seized without a warrant under Subsection 58-37-13(2).

(c) Notice of the seizure and intended forfeiture shall be filed with the county clerk, and served together with a copy of the complaint, upon all persons known to the county attorney or district attorney to have a claim in the property by one of the following methods:

(i) upon each claimant whose name and address is known, at the last-known address of the claimant, or upon each owner whose right, title, or interest is of record in the Division of Motor Vehicles, by mailing a copy of the notice and complaint by certified mail to the address given upon the records of the division, which service is considered

complete even though the mail is refused or cannot be forwarded; and

(ii) upon all other claimants whose addresses are unknown, but who are believed to have an interest in the property, by one publication in a newspaper of general circulation in the county where the seizure was made.

(d) Except under Subsection (8)(c), any claimant or interested party shall file with the court a verified answer to the complaint within 20 days after service has been obtained.

(e) When property is seized under this chapter, any interested person or claimant of the property, prior to being served with a complaint under this section, may file a petition in the court having jurisdiction for release of his interest in the property. The petition shall specify the claimant's interest in the property and his right to have it released. A copy shall be served upon the county attorney or, if within a prosecution district, the district attorney in the county of the seizure, who shall answer the petition within 20 days. A petitioner need not answer a complaint of forfeiture.

(f) After 20 days following service of a complaint or petition for release, the court shall examine the record and if no answer is on file, the court shall allow the complainant or petitioner an opportunity to present evidence in support of his claim and order forfeiture or release of the property as the court determines. If the county attorney or district attorney has not filed an answer to a petition for release and the court determines from the evidence that the petitioner is not entitled to recovery of the property, it shall enter an order directing the county attorney or district attorney to answer the petition within ten days. If no answer is filed within that period, the court shall order the release of the property to the petitioner entitled to receive it.

(g) When an answer to a complaint or petition appears of record at the end of 20 days, the court shall set the matter for hearing within 20 days. At this hearing all interested parties may present evidence of their rights of release of the property following the state's evidence for forfeiture. The court shall determine by a preponderance of the evidence the issues in the case and order forfeiture or release of the property as it determines.

(h) Proceedings of this section are independent of any other proceedings, whether civil or criminal, under this chapter or the laws of this state.

(i) When the court determines that claimants have no right in the property in whole or in part, it shall declare the property to be forfeited and direct it to be delivered to the custody of the Division of Finance. The division shall dispose of the property under Subsection (8).

(j) When the court determines that property, in whole or in part, is not subject to forfeiture, it shall order release of the property to the proper claimant. If the court determines that the property is subject to forfeiture and release in part, it shall order partial release and partial forfeiture. When the property cannot be divided for partial forfeiture and release, the court shall order it sold and the proceeds distributed:

(i) first, proportionally among the legitimate claimants;

(ii) second, to defray the costs of the action, including seizure, storage of the property, legal costs of filing and pursuing the forfeiture, and costs of sale; and

(iii) third, to the Division of Finance for the General Fund.

(k) In a proceeding under this section where forfeiture is declared, in whole or in part, the court shall assess all costs of the forfeiture proceeding, including seizure and storage of the property, against the individual or individuals whose

conduct was the basis of the forfeiture, and may assess costs against any other claimant or claimants to the property as appropriate.

APPENDIX D

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IN THE FOURTH JUDICIAL DISTRICT COURT OF
UTAH COUNTY

STATE OF UTAH

STATE OF UTAH Plaintiff,	:	
	:	FINDINGS OF FACT AND CONCLUSIONS OF
vs.	:	LAW UPON REMAND
REAL PROPERTY AT 633 EAST 640 NORTH	:	Case No. 930400383
OREM, UTAH	:	Judge Ray M. Harding
Defendant(s).	:	

This matter comes before the Court following appeal to the Utah Supreme Court of this Court's judgment and remand for further findings on designated issues. The Supreme Court remanded with direction to this Court to make findings and conclusions on constitutional issues of double jeopardy and excessive penalty under the Fifth and Eighth amendments to the United States Constitution and/or Article I Sections 9 and 12 of the Utah Constitution. This Court has reviewed the record of this case and records available to it, as described below, and makes the following:

FINDINGS OF FACT

1. In accordance with Rule 201 of the Utah Rules of Evidence the Court takes judicial notice of the following documents in the following cases:

Fourth District Court Case number 931400202, State v. Linda Cannon:

Information
Trial minute entry (8/1/94)
Minute entry/Order for 60 day evaluation (9/21/94)
Minute entry/Judgment and Order of Probation (11/28/94)
Minute entry/Probation Revoked and Reinstated (2/22/95)

Fourth District Court Case number 941400020, State v. Linda Cannon:

Information
Findings of Fact and Conclusions of Law (5/17/94)

Statement in Advance of Pleading Guilty (8/4/94)
Minute entry/Change of Plea (8/4/94)
Minute entry/Judgment and Order of Probation (12/15/94)
Minute entry/Probation Revoked/Reinstated (2/16/95)

Fourth District Court Case number 941400504, State v. Linda Cannon:

Information
Minute entry/Notice 2/24/95

Warrant for Delinquent Tax assessed by the Utah State Tax Commission pursuant to the Illegal Drug Stamp Act August 31, 1993.
Account No. 93-004/528-58-6171

Warrant for Delinquent Tax Assessed by the Utah State Tax Commission pursuant to the Illegal Drug Stamp Act November 15, 1994. Account No. 93-004/528-58-6171

Certified copies of the documents described above are attached and included in this file as by reference.

1. With respect to Case 94140202 the Court makes the following findings which are relevant to this case:

a. On January 20, 1993 Linda Cannon, claimant in this case, was charged by information with possession of marijuana with intent to distribute, a third degree felony; possession or use of cocaine, a second degree

felony; illegal drug tax, a third degree felony; possession or use of marijuana, a class B misdemeanor. All counts were alleged to have occurred on January 15, 1993.

b. The maximum possible fine for all counts charged totaled $22,000.00 plus an 85% surcharge of $18,700.00 for a total possible fine and surcharge of $40,700.00. If imposed to run consecutively the total possible incarceration would have been 21 years.

c. The case was tried to a jury before Judge Burningham on August 1st and 2nd, 1994. 6 witnesses testified for the State and the results of State crime lab analysis were proferred. Following deliberations the jury returned a guilty verdict of possession of marijuana with intent to distribute, a third degree felony; possession of cocaine, a second degree felony; illegal drug tax, a third degree felony; and possession of drug paraphernalia, a class B misdemeanor. The defendant was referred to the Department of Adult Probation and Parole for the preparation of a pre-sentence report. The maximum total fines and fees for the crimes of which the Claimant were convicted are $38, 850.00. Total maximum incarceration, if all terms were imposed to run consecutively was 20 years in prison and 6 months in the Utah County Jail.

d. On September 21, 1994 Linda Cannon was committed to the custody of the Division of Corrections for a 60 day evaluation, prior to sentencing.

e. On November 28, 1994 Linda Cannon was sentenced to terms at the Utah State Prison of up to 5 years for possession of marijuana with intent to

distribute; one to 15 years for possession of cocaine; up to 5 years for the tax stamp violation; and up to 6 months in jail for the paraphernalia charge. All of the terms were ordered to run concurrently and the defendant was placed on probation with the Department of Adult Probation and Parole. The Defendant was ordered to complete the Women's Community Correctional Center program and then complete the Intensive Supervision Probation program with Adult Probation and Parole. She was ordered to pay a total fine of $2,000 plus a $1,700 surcharge.

f. On February 22, 1995 Linda Cannon was before the Court on an Order to Show Cause why her probation should not be revoked. The court found that she had failed to complete the Women's Community Correctional Center program and revoked her probation but reinstated probation and ordered her to complete the park View Community Correctional Center program.

3. With respect to Case 941400020 the Court makes the following findings which are relevant to this case:

a. Linda Cannon, claimant in this case, was charged on September 13, 1993 with possession of marijuana with intent to distribute, a third degree felony; illegal drug tax, a third degree felony; possession or use of cocaine, a second degree felony; and unlawful possession of drug paraphernalia, a class B misdemeanor. All counts were alleged to have occurred on or about September 8, 1993.

b. The maximum possible fine for all of the offenses totals $22,500.00 plus a possible 85% surcharge of $19,125 for a total possible monetary penalty

of $41,625.00. The maximum possible period of incarceration, if all terms were imposed to run consecutively would have been 21 years.

c. On April 22, 1994 the Court considered a motion to suppress the search of September 8, 1993. The motion was denied as described in the findings of fact and conclusions of law which found, in essence, that the agents of the Department had a reasonable suspicion that both the claimant and her son, Sonny Jensen, were using and/or selling controlled substances from the residence which is the subject of this action.

d. On August 4, 1994, Linda Cannon appeared with her counsel and plead guilty to possession of marijuana with intent to distribute, a third degree felony. Remaining counts were dismissed as part of a plea arrangement described in the statement before pleading guilty as "other charges dismissed and the defendant will retain the right to contest State's motion to enhance based on prior conviction. State will not oppose concurrent sentence with Judge Burningham conviction" [sic]. The maximum fines and fees that could have been imposed for the offense to which the claimant plead guilty are $9,250.00 and up to 5 years in prison.

e. On December 15, 1994 Linda Cannon appeared before the Court following the preparation of a pre-sentence investigation by the Department of Adult Probation and Parole and was sentenced to pay a fine in the amount of $500.00 plus a surcharge of $425.00. In addition, she was ordered to enter and complete the program at the Women Community Correctional Center followed by

completion of the Intensive Supervision Probation Program with the department of Adult Probation and Parole.

f. On February 16, 1995 Linda Cannon was again before the court which noted that her probation had been revoked on January 30, 1995. Probation was reinstated and she was ordered to enter and complete the program at Park View Correctional Center.

4. With respect to Case 941400504 the Court makes the following findings which are relevant to this case:

a. On July 14, 1994 Linda Cannon, claimant in this case, was charged by information with possession of marijuana with intent to distribute, a third degree felony; possession or use of methamphetamine, a third degree felony; possession or use of cocaine, a second degree felony; illegal drug tax, a third degree felony; and possession of drug paraphernalia, a class B misdemeanor. All counts were alleged to have occurred on June 24, 1994.

b. The maximum possible fine for all counts charged totaled $26,000.00 plus an 85% surcharge of $22,100.00 for a total possible fine and surcharge of $48,100.00. If imposed to run consecutively the total possible incarceration would have been 25 years and six months.

c. On February 24, 1995 the counts were dismissed by the State in accordance with plea negotiations.

5. The warrant for tax imposed August 31, 1993 shows that a tax of $3,159.10 was imposed as a tax or penalty for the possession of unstamped illegal drugs on January 15, 1993.

6. The warrant for tax imposed November 15, 1994 shows that a tax of $1,876.00 was imposed as a tax or penalty for the possession of unstamped illegal drugs on September 8, 1993 and June 24, 1994.

7. Three searches of the subject property, identified as the home of Linda Cannon, were described during the trial of this matter. The first occurred on January 15, 1993 which corresponds to the date of the charges in case 94140202, described above. The second occurred on September 8, 1993 which corresponds to the date of the charges in case 93140020, described above. The third occurred on June 24, 1994 which corresponds to the date of the charges in case 941400504, also described above. Each of the searches resulted in charges against the claimant for possession of marijuana with intent to distribute and additional narcotics related offenses. The claimant was convicted, following jury trial, of all but one (simple possession of marijuana) of the charges filed from the first search in January of 1993. The claimant plead guilty to possession of marijuana with intent to distribute from the search in September, 1993. The charges from the search in June of 1994 were dismissed pursuant to plea negotiations after sentence was pronounced in the other two pending cases.

8. The property in question in this case has been sold and the net proceeds, subject to forfeiture, valued at $71272.30 have been deposited in an account to be held pending determination of this matter.

9. The residence in this case was the direct instrumentality of repeated instances of criminal conduct involving, at a minimum, the storage and sale of marijuana by the claimant, Linda Cannon including the distributions from the home before the first search on January 15, 1993, the possession of marijuana and other drugs on January 15, 1993 and possession of marijuana with intent to distribute on September 8, 1993 and again on June 24, 1994. The conduct and continued storage of marijuana for distribution in the home on September 8, 1993 and June 24, 1993 occurred after the Claimant had been charged for the January incident and while the Claimant was on supervised probation with the Department of Adult Probation and Parole for other incidents not occurring at the home. This conduct represents a pattern of unlawful conduct of the claimant occurring at the home which is the subject of this action.

10. Co-residents of the home, who do not claim an ownership interest in the home but nevertheless have resided at the home at various times from January 15, 1993 until the home was seized include the Claimant's husband, Paul Cannon, her daughter, Pat Smith was a co-defendant in case 931400202 (search of January, 1993). Paul Cannon was a co-defendant in cases 941400020 (search of September, 1993) and 931400504 (June, 1994). Only the daughter of the claimant appears to have had no involvement in the controlled substance violations at the home.

11. Criminal charges resulting from the three searches against the claimant could have resulted in the imposition of total fines and fees in the amount of $130,425.00. If only counts to which the claimant plead guilty or for which the claimant was found guilty are considered, total possible fines and fees from the searches are $48,100.00. The total fines and fees actually imposed from all of the criminal conduct total $4,625.00. Drug stamp taxes totaling $5,024.10 have also been imposed. The claimant has received an in-custody evaluation at the Department of Corrections diagnostic center and been housed and treated at the Women's Community Correctional Center for approximately two months and then at the Parkview Community Corrections center. She has been supervised as a probationer from the time of her sentencing through the present time.

12. Removal of the home the claimant has had a direct impact for good in contributing to the termination of the claimant's extensive on-going illegal possession of marijuana for distribution and use and/or possession of other illegal substances.

13. The State's pursuit of this forfeiture action was commenced in a timely manner and in accordance with the statutory forfeiture requirements in effect at the time of the action. Prosecution of the forfeiture cases was conducted by separate State's counsel until judgment in the trial court although the two actions were, essentially, contemporaneous. The verified complaint in this matter was dated July 23, 1993, several months following the first search in January of 1993 but before the subsequent searches in September of 1993 and June of 1994. Trial was

conducted in this matter on August 23, 1994, within three weeks of the claimant's jury trial on the first search and guilty plea on the second search and before sentencing on either case.

14. Forfeiture of the property in this case results not only from the utilization of the property for the crimes committed in January, 1993 but from the on-going nexus of the property to repeated violations of the Controlled Substances Act from before that time in the form of sales of controlled substances from the home through the last search presented to this court in June of 1994.

15. The use and sale of controlled substances is one of the single most serious factors affecting and utilizing the resources of this court and state criminal system of justice. Forfeiture of this property, together with total fines and fees imposed imposes a financial impact upon the claimant of approximately $80,921.40 which is the equivalent of only 18 pounds of marijuana (calculated at 453 grams per pound and $10 per gram street value). The claimant received at least 5 months of in-patient, intensive drug therapy and the resources of this state have been extensively utilized to modify her substantial criminal behavior.

CONCLUSIONS OF LAW

1. This forfeiture is a civil *in rem* proceeding, brought against the subject property because of the property's on-going involvement as a situs of violations of the Utah Controlled Substances Act.

2. This civil *in rem* forfeiture is not a criminal prosecution or solely punitive in nature.

3. The drug asset forfeiture provisions of the Utah Controlled Substances Act was intended by the legislature to be a remedial response to illegal drug activities inasmuch as the process is an *in rem* proceeding utilizing civil procedures and protections instead of the *in personam* process of criminal prosecution.

4. Forfeiture of this real property has served a remedial purpose of removing this drug house from the stream of narcotic commerce, thereby serving the public by removing a drug safehouse from its ongoing criminal use, and by cleansing the site of significant and on-going drug distribution activities by forfeiting the legal interest of the Claimant who used the home in an on-going course of conduct to facilitate illegal drug activities.

5. The forfeiture of this property does not offend constitutional proscriptions against double jeopardy.

a. The forfeiture was not authorized by mere proof of the commission of a crime but by additional proof establishing that the property had a nexus to substantial, on-going drug crimes and the property was possessed by the claimant while the offenses were committed.

b. The forfeiture was prosecuted in a timely manner, consistent with the statutory provisions in effect at the time and contemporaneous with the prosecution

of the claimant for multiple offenses committed at the residence.

c. The forfeiture results, in large part, from the close nexus of the property to the continued and ongoing pattern of criminal conduct including the possession of drugs as indicated in the search occurring in June, 1994 for which no criminal penalty, fine or fee was ever imposed upon the claimant.

d. The removal of the property as a direct instrumentality of the crimes indicated by the evidence in this case serves a remedial purpose for the State by separating the claimant and others who have committed these on-going crimes from the property.

e. Forfeiture furthers serves a compensatory purpose in providing funds for the ongoing enforcement of controlled substance laws of the State of Utah.

6. Forfeiture of the property described in this complaint is not excessive.

a. There is a close nexus of the property to the extensive and continued criminal conduct of the claimant in this case.

b. The value of the property forfeited does not grossly exceed the potential fines and fees in this case.

c. The forfeiture will not significantly impact other residents of the property since all but one have also been implicated in the criminal conduct giving rise to forfeiture.

d. The forfeiture is the result of extensive, serious conduct by the claimant which presented significant theat of harm and cost to society.

e. Forfeiture of this property does not impose hardship upon the claimant that is more extensive or severe than would have been imposed for other, equally serious conduct, under the laws of the State of Utah.

f. Forfeiture of property established to have been an instrumentality for the sale of drugs is authorized by virtually every state and federal government.

DATED this _____ day of April, 2000

BY THE COURT:

_____
RAY M. HARDING
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON REMAND was mailed this _____ day of October, 1997, to: Randy Gaither, Attorney for Defendant-Appellant, 321 South 600 East, Salt Lake City, Utah 84102

_____

Supreme Court, U.S.
FILED
MAY 26 2000
CLERK

(3)

No. 99-1710

In The

SUPREME COURT OF THE ~~UNITED STATES~~

STATE OF UTAH,

Petitioner,

vs.

LINDA CANNON

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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1799

ISSUES PRESENTED FOR REVIEW

Under Utah Code Annotated 58-37-13(1953) as enacted in 1993, Mrs. Cannon's residence was not used to produce, cultivate, or manufacture a controlled substance. Therefor the State relied on a provision of law that provided that if marijuana with a street value in excess of $1000 was found at the residence and if the owner of that interest knew about or willingly consented to the presence of the marijuana on the property. The Utah Supreme Court established a common sense and manageable manner of applying of the excessive fine clause of the Eighth Amendment in Utah and created a threshold under which the State of Utah cannot forfeit a personal residence value forfeited is found to be grossly disproportional to the criminal conduct triggering the forfeiture, the fines imposed and the sentence imposed.

This Brief in Opposition to the Petition presents the following questions:

1. Should this Court return to the traditional "guilty property" theory for forfeiture analysis of property other than contraband rejected in Austin v. United States, 509 U. S. 602 (1993)?

2. Did the Utah Supreme Court specifically recognized the remedial aspects of an "in rem" instrumentality forfeiture when the Utah Supreme Court found for the purposes of the Cannon forfeiture proceeding that the subject house in fact was an instrumentality subject to forfeiture?

3. Did the District Court err in supplementing the record on remand by taking judicial notice of matters not considered at the first hearing by judicial notice and did the procedure denied the appellant and Mrs. Cannon her rights to Due Process under the United States Constitution and Utah Constitution?

PARTIES TO THE PROCEEDING

Linda Cannon is the Claimant to the subject real property, and was the Defendant in the Trial Court and Appellant in Utah Supreme Court, and Respondent in the instant case.

State of Utah is the Plaintiff in the Trial Court, the Appellee in Utah Supreme Court and the Petitioner in the instant case.

TABLE OF CONTENTS

STATEMENT OF FACTS 1

REASONS FOR DENYING THE WRIT 7

I. **THE UTAH SUPREME COURT APPLIED THE PRECEDENT PROPERLY IN FORMULATION A TEST IN THE ATTEMPTED FORFEITURE BY LAW ENFORCEMENT OF A FAMILY RESIDENCE** 8

II. **THE FORFEITURE PROCEEDINGS UNDER THE UTAH CONTROLLED SUBSTANCE ACT CANNOT BE LABELED AS TRADITIONAL CIVIL IN REM PROCEEDINGS** 14

III. **THE DISTRICT COURT ERRED IN SUPPLEMENTING THE RECORD BY TAKING JUDICIAL NOTICE OF MATTERS NOT CONSIDERED AT THE FIRST HEARING AND DENIED THE APPELLANT AND CLAIMANT DUE PROCESS UNDER THE UNITED STATES AND UTAH CONSTITUTION** 18

CONCLUSION 22

TABLE OF CITED AUTHORITIES

Austin v. United states, 509 U.S. 602 (1993) 14,16

In re: *1650 Cases of Seized Liquor*, 721 A.2d 100 (VT Sup. Ct. 1998) .. 17

Muhar v. One 1997 Harley-Davidson Motorcycle, No. C6-99-1053 (Minn. App. 1999) 13

One 1995 Toyota Pick-Up Truck v. District of Columbia, 718 A.2d 558 (D.C. 1998) 13

State v. A House and 1.37 Acres of Real Property Located at 932 South 600 East, Nephi, Utah 886 P.2d 534 (Utah 1999) 10, 12, 18

State v. Cannon, 2000 UT 17 at 22 ..... 8, 12, 16, 19

State of Utah v. Real Property at 663 East 640 North, Orem, Utah, 942 P.2d 925 (Utah 1997) 6, 16

State v. Yates, 765 P. 2d 251 (Utah 1988) 20

Trimble Real Estate v. Monte Vista Ranch, Inc., 758 P.2d 451 (UT. Ct. App. 1988) 20

Unites States v. Bajakajian, 118 S. Ct. 2028 (1998) 9, 12, 13, 16

United States v. Johnson, 182 F.2d 934 (10th Cir. 1999) 9

United States v. Gaston, 176 F.3d 476 (4th Cir. 1999) 12

CODES AND STATUTES

21 U.S.C. 853 12

Utah Code Ann. 58-37-13 (1953) ..... 8, 12, , 15, 16

Utah Rule of Evidence 201(b) 19

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Eight Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

2. Utah Code Ann. § 58-37-13 (1996), is reprinted in Appendix 1.

STATEMENT OF FACTS

The Respondent, Linda Cannon, disputes the statement of material facts set forth in the Petition for Writ of Certiorari filed by the State of Utah. The Utah Supreme Court specifically reserved ruling on factual issues raised by the Respondent in the Appeal to the Utah Supreme Court as to the propriety of the trial court's use of judicial notice. (See Point III, herein). The Petitioner's Statement of Facts includes facts improperly made part of the record through the judicial notice process and the Respondent has consistently objected to the consideration of those facts.

The Respondent submits the objective facts proven by admissible evidence at the forfeiture hearing on August 23, 1994 are the only undisputed material facts that should be considered in support of the Petition. The actual evidence introduced at the forfeiture hearing by both the State of Utah and Mrs. Cannon can be summarized as follows:

1. Linda Cannon was the owner of the real property located at 633 East 640 North, Orem, Utah and she was one of the five persons living in the family residence. (Record 228)

2. Officer Phillip Murphy served a search warrant on the subject residence on January 15, 1993 and he testified that when he entered the house to serve the warrant, he observed three women sitting around the kitchen table.

(Record 171)

3. The second witness, Officer Lee Fox, testified that the officers found in a refrigerator in the house approximately one pound of marijuana, a beam scale, and a set of finger scales in the subject house. On direct, he testified in his opinion that the street value of the marijuana was $4,536.00 if the bulk quantity was broken up for sale in one gram amount. (Record 176) This opinion was based upon the fact that there is 453 grams in a pound and the assumption that the entire bulk quantity would be distributed in one gram quantity. (Record 179)

4. On cross-examination, Officer Fox testified that in January 1993 a person in Utah County, Utah, could purchase a pound of marijuana between $800.00 and $900.00 dollars. (Record 179). He admitted that the marijuana found in the residence could have been smoked instead of sold. (Record. 180) The marijuana was packaged in a single bag when weighed by the state laboratory were 446 grams of marijuana. (Record 187). He testified that marijuana is typically sold in bags containing 3.5 grams not one gram bag (Record 187). The Officer testified that when he went into the residence the marijuana was in the freezer section of the kitchen refrigerator and there was three women were sitting in the kitchen smoking a joint of marijuana. (Record 182)

5. Officer Fox testified that all throughout the residence the law enforcement officers found paraphernalia such as pipes, rolling papers, and ashtrays with a marijuana residue that would be consistent with the consumption of marijuana. (Record 183). He stated that Pat Smith, one of the women at the kitchen counter was charged with a felony on the basis of the evidence found in the house. Jodie Jackson was also charged with a crime for the controlled substances in the residence. (Record 184). The officer had personal knowledge that the two male residents, Paul Cannon and Brent Jackson were both known to law enforcement as users of marijuana. (Record 185). None of the plastic bags typically used to distribute marijuana in 1/8th or in any other small amounts were found in the search of the residence. (Record 187)

6. Officer Mike Blackhurst was allowed by the Court over an objection of the Defendant to testify as to the search of the residence at the subsequent date of September 8, 1993 and a copy of the affidavit for Search Warrant was received into evidence Exhibit 4. (Record 192) The Court limited the evidence to:

> The sole purpose of the corroboration of the incident subject to the complaint and the burden that the state has in establishing that the dwelling place and possession of the controlled substance is more than merely use and the requirement that the warehousing storing protecting or manufacturing is as the statute requires. And going to that

> evidence, the court will permit it. However, as previously indicated in chambers off the record, I am not permitting it to expand the amount of controlled substance present at the time of the alleged forfeiture on the 15th of January, only to show that it may have been used at other times that purpose. (R. 192)

7. Lee Fox was recalled and testified that during the September 8, 1993-search that four one-ounce baggies of marijuana were found in the residence and other amounts of marijuana which totaled approximately one quarter of one pound. (Record199) The officer stated on cross-examination that Paul Cannon told him in September 1993, that the marijuana found in the residence was his marijuana. (Record 201). He testified that in his opinion the value of the marijuana on the second search would be less than the statutory amount of $1,000.00 in the amount of $300.00 to $400.00. (Record 201)

8. Jerry Lee Harper, a Provo police officer testified that on June 24, 1994, found that there was 164.5 grams of marijuana and 2.5 grams of marijuana in another area in the house. (Record 209)

9. After the State rested, Linda Cannon, took the stand and she testified that at the time of the hearing she had been recently convicted in August 1994 for a criminal conviction for the same one pound marijuana in the refrigerator upon which the forfeiture action was based. (Record 225)

10. Mrs. Cannon testified that as a result of the same incident and the 451 grams of marijuana found in the residence was the basis for a tax

assessment by the Utah Tax Commission for a lack of tax stamps. (Record 228). The Claimant Linda Cannon as an owner of the residence prior to the forfeiture hearing had been subjected a judgment for tax by the Utah State Tax Commission in the amount of $3,500.10 as a result of the marijuana which was used for the basis of the criminal conviction set forth above and also for this forfeiture action. (The Utah Supreme Court did not rule on the double jeopardy issue on appeal because of the reversal based on the excessive fine clause).

11. The Respondent described to the trial court that she had lived in the residence since June of 1973 when she purchased the residence with her first husband, Daryl Jensen. (Record 230). She was living in the residence with her mentally disabled daughter Dixie Jensen. Mrs. Jensen testified that she received money from her ex-husband and Social Security which she had used to pay the first mortgage of about $30,000.00 on the home which had an equity value at $80,000.00. (Record. 232). Mrs. Cannon testified that she was fifty years of age and had no other assets other than the home. She testified that she intended to live in the house after the house with her new husband and her disabled child after she had completed the jail sentence in relation to her criminal conviction.(Record 234).

12. On July 22, 1997, the Utah Supreme Court entered a decision in

State of Utah v. Real Property at 633 East 640 North, Orem, Utah, 942 P.2d 925 (Utah 1997).

13. In that decision, the Utah Supreme Court remanded the matter to the District Court because of the Trial Court's failure to rule on the Eighth Amendment issue raised by Linda Cannon and the Judge failed to the necessary factual findings crucial to the constitutional issues.

14. After the matter was remanded to the Utah County District Court hearing, the Claimant filed proposed Findings of Fact and Conclusions of Law based upon the actual evidence introduced at trial and a memorandum in support of the Claimant's proposed Findings of Fact and Conclusions of Law with the District Court.

15. The State filed a Memorandum in support of the Plaintiff's response to Claimant's Proposed Finding of Fact and Conclusions of Law submitting new facts and requesting the Court to take judicial notice of these facts. The Claimant, Linda Cannon, in response requested oral argument before the Court by written Motion filed with the court.

16. On January 21, 1998, Third District Court Judge Ray M. Harding Sr., denied the request for oral arguments. Without holding a hearing and without any new evidence being offered in the proceedings, the Court proceeded to execute without notice to the Claimant, the "Findings of Fact and

Conclusions of Law upon Remand."

17. As result of the Stipulation whereby the residence was sold and the equity interest held in trust by the State pending appeals. On April 17, 2000, the trial court in Provo entered a Judgement in favor of Mrs. Cannon for the amount of the equity interest for the house that was sold by the State. No stay has been granted by District Court of Utah as to the Judgement. In granting the Motion for Judgement, the trial Court denied the request of the State of Utah for a stay of the Judgment pending the Petition to this Court.

REASONS FOR DENYING THE WRIT

The Utah Supreme Court was unanimous in setting aside an unjust and harsh forfeiture of a family residence. It issued a well-reasoned decision concerning basic Eighth Amendment standards in the context of the Utah statute. The decision was an extension of prior Utah law interpreted in the context of Federal principles announced by this Court. The Utah Court established a common sense and manageable manner of applying the excessive fine clause of the Eighth Amendment in Utah and created a threshold under which the State of Utah cannot forfeit a personal residence where marijuana is found if the forfeiture is grossly disproportional to the criminal conduct triggering the forfeiture.

I. THE UTAH SUPREME COURT APPLIED THE PRECEDENT PROPERLY IN FORMULATION A TEST IN THE ATTEMPTED FORFEITURE BY LAW ENFORCEMENT OF A FAMILY RESIDENCE.

Contrary to the State's position, the Utah Supreme Court specifically recognized the remedial aspects of "in rem" instrumentality forfeiture when the Utah Supreme Court found for the purposes of the Cannon forfeiture proceeding that the subject house in fact was an instrumentality subject to forfeiture. The Court ruled that the instrumentality test of controlled substance forfeiture was satisfied as the subject residence in State v. Cannon, 2000 UT 17 at 22 (Utah 01/19/2000) stating:

> "We similarly hold that the threshold test in real property forfeitures is whether the defendant property is an instrumentality of the offense. If instrumentality is proven, we must then examine whether the ordered forfeiture is "grossly disproportionate" to the offense. However, because in the instant case we rest our decision on gross disproportionality, we will assume for purposes of discussion, but not decide, that the instrumentality test has been satisfied."

The remedial, instrumentality aspect for forfeiture proceedings is the first prong of two-prong tests for all forfeiture actions under *Utah Code Annotated* 58-37-13 (1953). By ruling that this particular forfeiture of real property was "grossly" disproportional and excessive, the Utah Supreme Court did not prohibit or unreasonably limit future forfeitures by the State that are

reasonable and objectively related to proven remedial purposes and punishment objectives.

The State seeks a review in this matter by shaping complicated, theoretical arguments which disregard the basic inequity of the forfeiture. The Utah Supreme Court's straightforward and direct ruling in this particular case should not materially limit controlled substance forfeitures of real property in the State of Utah. The State needs only to present evidence that the attempted forfeiture does 'bear some relationship to the gravity of the offense it is designed to punish.' United States v. Johnson, 182 F.3d 934 (10th Cir. 1999)(citing United States v. Bajakajian, 118 S.Ct. 2028 (1998)). The claimant then has the burden to show that forfeiture of his property would be grossly disproportionate given the nature and extent of his criminal culpability.

The trial court's test of forfeiture did not consider the monetary value of the property, the extent of criminal activity associated with the property, the fact that the property was a residence, the effect of forfeiture on innocent occupants of the residence, including children, or any other fact other than the mere presence of marijuana. A review of the evidence offered at trial in this matter will show that the State never attempted to actually prove any remedial aspect of the forfeiture at the hearing or the value of the property. The trial Court never found any remedial purpose for the forfeiture other than a bulk

quantity of more than $1,000.00 worth of marijuana in the house. The State did introduce evidence of two subsequent searches where less than the statutory amount of $1,000.00 was found as well as drug paraphernalia. Further, the State has never identified the specific "remedial purpose" that a forfeiture of the equity value of the house would have which would be advanced by the transfer to the State of Mrs. Cannon's $72,000.00 equity to the Utah County Drug Task Force.

The Utah Supreme Court relied on the prior Utah decision in State v. A House and 1.37 Acres of Real Property Located at 392 South 600 East, Nephi, Utah, 886 P.2d 534 (Utah 1994) where the Utah Court stated in an action to forfeit a house under the same statute as involved in this Petition:

> "According to the plain import of this provision, [Utah Cond Annotated 58-37-13 (1953)] any interest in real property is automatically subject to forfeiture if (i) it was "used in producing, cultivating, or manufacturing controlled substances," and (ii) the owner of the property interest knew about or willingly consented to the act which made the property subject to forfeiture. Utah Code Ann. ° 58-37-13(1)(i)(ii), (iii). **A different standard applies, however, if the real property interest is used to facilitate a violation of the act which does not involve the producing, cultivating, or manufacturing of a controlled substance. In that case, the property interest is subject to forfeiture only if (i) "cumulative sales of controlled substances on the property within a two-month period total or exceed $1,000, or the street value of any controlled substances found on the premises at any given time totals or exceeds $1,000," and (ii) the owner of the property interest knew about or willingly consented to the act which made the**

property subject to forfeiture. Id. (emphasis added). The Residence was not used to produce, cultivate, or manufacture a controlled substance. The record clearly indicates, however, that marijuana with a street value in excess of $1000 was found at the residence. Thus, any property interest in the Residence is subject to forfeiture if the owner of that interest knew about or willingly consented to the presence of the marijuana on the property. **"(Emphasis added)**

"We are persuaded that the analysis in Austin applies equally to section 58-37-13(1)(i). As pointed out in Austin, "forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence." Id. at 2812 n.14. In addition, as was true of the federal statutes at issue in Austin, section 58-37-13(1)(i) contains an "innocent-owner" defense. Utah Code Ann. §§ 58-37-13(1)(i)(ii). This exemption serves to "focus the provision[] on the culpability of the owner in a way that makes [it] look more like punishment, not less." Austin, 113 S. Ct. at 2811. Finally, the Austin Court essentially foreclosed any claim that the forfeiture of real property could be viewed as reasonable liquidated compensation to the state for the expense of law enforcement activity and social expenditures related to drug addiction. According to Austin, "The value of the conveyances and real property forfeit able under §§§§ 881(a)(4) and (a)(7) . . . can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental." Id. at 2812 n.14; see also United States v. Ward, 448 U.S. 242, 254, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980) (holding that "forfeiture of property . . . [is] a penalty that has absolutely no correlation to any damages sustained by society or to the cost of enforcing the law"). In light of the historical understanding of forfeiture as punishment, the focus of section 58-37-13(1)(i) on the culpability of the owner, and the Supreme Court's rejection of the notion that forfeiture is a reasonable liquidated compensation to the state, we conclude that section 58-37-13(1)(i) is punitive, at least in part. A forfeiture pursuant to that section is therefore subject to the limitations of the Eighth Amendment's Excessive Fines Clause."

In the ruling here, the Utah Supreme Court was continuing and refining the 1994 ruling which applied the excessive fine clause of the Eighth Amendment of the United States Constitution to the same language used to attempt to statutorily forfeit the Cannon residence. The ruling was made in the context of the Utah statutes that distinguish between the forfeiture requirements as to real property used for producing, cultivating, or manufacturing of a controlled substance and the forfeiture requirements real property where controlled substances assumed to be held for sale are found. The classification difference of Utah Code Annotated 58-37-13 (1953) was a material basis in the Nephi ruling and was taken into account in the ruling in Cannon. The State fails in the petition to recognize that the forfeiture statute itself focuses on the owners knowledge and the underlying criminal offense, regardless of any Eighth Amendment analysis.

The Federal Courts have adopted the Bajakajan doctrine to the Federal Controlled Substance Statutes. For example, in United States v. Gaston, 176 F.3d 476 (4th Cir. 1999), the Fourth Circuit Court ruled that criminal forfeiture under 21 U.S.C. 853 is an element of the sentence imposed following a defendant's conviction for substantive drug offenses. The Court in Gaston, characterized as a forfeiture punishment with the sole inquiry in analyzing whether the forfeiture is constitutionally excessive is whether the forfeiture "is

grossly disproportional to the gravity of a defendant's offense" following United States v. Bajakajian, 118 S.Ct. 2028 (1998).

Likewise, the States have made similar ruling in One 1995 Toyota Pick-Up Truck v. District of Columbia, 718 A.2d 558 (D.C. 10/01/1998). There the Court applied the proportionality test of Bajakajian to the present case, we conclude the forfeiture of a truck and the forfeiture was deemed a constitutionally excessive fine. Also, in Muhar v. One 1997 Harley-Davidson Motorcycle, No. C6-99-1053 (Minn. App. 12/21/1999). The Court applied Bajakajian's "gross disproportionality" test in upholding an excessive-fines challenge under the vehicle forfeiture statute.

Here, the trial court accepted the evidence that Marijuana was found in the residence and declared a forfeiture without considering whether the punishment was excessive despite repeated requests by Mrs. Cannon to raise excessive punishment and proportionality issue before the Court. The trial judge treated forfeiture to the State as automatic if marijuana was found in the residence and did not even consider the actual punishment received by Mrs. Cannon in the underlying criminal matter. This draconian ruling of automatic forfeiture demonstrates the need for specific legal tests setting thresholds and guidance to trial courts to prevent the manifest injustice which caused the windfall to the State. The States position in the Petition that the remedial aspect

of the forfeiture proceeding of any type of real estate can be quantified and given a partial monetary value is a unique, illogical and impractical position which needs no "clarification" by this Court and was unanimously rejected by the Utah Supreme Court. The Utah Supreme Court applied the precedent of this Court properly in formulation a litmus test in the attempted forfeiture by law enforcement of a family residence in the context of the specific Utah Statute.

II. THE FORFEITURE PROCEEDINGS UNDER THE UTAH CONTROLLED SUBSTANCE ACT CANNOT BE LABELED AS TRADITIONAL CIVIL IN REM PROCEEDINGS

In Austin v. United States, 509 U.S. 602 (1993), this Court recognized that the characterization of proceeding as civil or in rem does not exempt forfeitures from the restriction of the Eighth Amendment excessive fine clause. The Court held that civil forfeitures which are intended to punish in whole or part, are subject to the clause. In Austin, the Court was dealing with the forfeiture of real property and held that even though there was evidence to prove the real property was used to facilitate the commission of a drug crime the proceedings were punitive in part and subject to the excessive fine clause.

The importance of the attempted characterization of this forfeiture proceeding as civil "in rem" tantamount to forfeiture of pure contraband urged by the State should be viewed in light of the current Utah statute forfeiture

controlled substance statute, Utah Code Annotated 58-37-13-9 (1953) (Set forth in Appendix 1). Under the present Utah statutory scheme the State can elect as to filing in the pending criminal proceedings, "in personam" or file a separate proceeding; civil "in rem" proceeding. Utah Code Annotated 58-37-13-9(a) or (b) (1953).(Appendix 1). A graphic example of the similarity of "in personam" or "in rem" proceedings is demonstrated by the following clause:

> **Utah Code Annotated 58-37-13-9 (c)** A complaint seeking forfeiture under Subsection (2)(k) shall be prepared by the county attorney, or if within a prosecution district, the district attorney, or by the attorney general, either in personam as part of a criminal prosecution, or in a separate civil in rem action against the property alleged to be proceeds, and filed in the county where the property is seized or encumbered, if the proceeds are located outside the state.

It is ironic that the State complains and petitions this Court to review the ruling of the Utah Supreme Court based upon the claimed significant distinction between "in personam" and "in rem"proceedings when in practice in Utah there is no material difference. In reality, under the Utah statute the distinction is blurred and there are not two separate distinct causes of action, only a procedural variance. Whether a person's residence is subject to a forfeiture in a proceeding "in rem" or "in personam" depends on how the County Attorney elects to file pleadings and how the action is styled. The substantive aspects are identical for forfeitures which can become"in rem"

when the pleading is typed at the County Attorney's Office.

In practice in Utah, the only meaningful distinction other than the heading on the pleadings is the type of notice given to interested parties. Under the State's interpretation of Utah Code Annotated 58-37-13 (1953), the notice requirement of an "in rem" proceeding can be by certified mail which will result in more forfeitures to the State than by personally serving the Defendant in a criminal Information, where forfeitures would be automatically set in light of the criminal sanctions imposed.

As an example, the heading in this case has evolved from "State v. Real Property at 633 East 640 North, Orem," to " State v. Linda Cannon". In the appeal process, Mrs. Cannon's personal interest in her residence and standing has been recognized and the technical "in rem" title styled by the State has been correctly modified during the appeal process to reflect the fact that she is the actual party.

The State is seeking to have this Court return to the traditional "guilty property" theory for forfeiture analysis of property other than contraband rejected in Austin v. United States, 509 U. S. 602 (1993), and United States v. Bajakajian, 118 S. Ct. 2028 (1998). The State is also trying to turn back the clock beyond recent decisions of the Utah Supreme Court to a position which will give the State tactical advantage in pleading cases in a manner that

removes the interest of the property owner and the results of the criminal proceedings from the forfeiture litigation.

The State failed to give any valid reason why this Court should interpret the application of specific statutory language of a State's forfeiture law when the State Supreme Court followed constitutional principles set forth by this Court. Since the Utah Statutory Scheme defines the grounds for forfeiture, this Court should not be interpreting the legislative enactments of Utah because the party believes the Utah Supreme Court mis-interpreted forfeiture law.

The Courts have recognized that actual contraband such as marijuana or liquor is subject to a "pure" in rem forfeiture. However, while a pure in rem proceeding against contraband may not be subject to the excessive fine clause, the Courts have consistently used the mere title is not determinative applicable because the forfeiture is not entirely remedial. In re 1650 cases of seized liquor, 721A.2d.100 (Vermont Sup. Ct. 1998). The Utah Statutes specifically apply the innocent owner defense to real property not used for certain specified purposes and therefore the State cannot assert that the residence itself is contraband and subject to forfeiture without any analysis under the Eighth Amendment. As discussed in Point I, the Utah Supreme Court has traditionally specifically considered forfeitures involving personal

residences differently from other forfeitures. State v. A House and 1.37 Acres of Real Property Located at 392 South 600 East, Nephi, Utah, 886 P.2d 534 (Utah 1994)

In this Petition for review of Certiorari the State of Utah is taking the same harsh view that was taken at trial court level at the forfeiture hearing and which was rejected by the Utah Supreme Court. Even though Mrs. Cannon proved that the residence was primarily used for family living purposes and for basic housing for herself and her adult handicapped child, the trial court refused to consider any of that evidence. Only upon appeal did five justices of the Supreme Court in looking at all of the evidence and factors find that the forfeiture was grossly disproportional and issued a ruling to correct the injustice.

III. THE DISTRICT COURT ERRED IN SUPPLEMENTING THE RECORD BY TAKING JUDICIAL NOTICE OF MATTERS NOT CONSIDERED AT THE FIRST HEARING AND DENIED THE APPELLANT AND CLAIMANT DUE PROCESS UNDER THE UNITED STATES AND UTAH CONSTITUTION

Without the State even filing a motion and without any hearing, the trial Judge on remand from the Utah Supreme Court adopted the State proposed findings. The lower Court by "judicial notice" adopted new evidence never introduced at the original hearing. The new evidence was

submitted to the Court as attachments to the State's Memo in support of Proposed Findings of Fact. The Court received new evidence by merely signing the Findings on Remand advanced by the State without any hearing. The Utah Supreme Court on this issue in State v. Cannon, 2000 UT 17 (Utah 01/19/2000) said:

> ¶¶29 Cannon contends that the trial court violated her due process rights by taking judicial notice of the second and third searches of the defendant property as well as the resolution of criminal charges stemming from the second search. It is unnecessary to reach this question. In our above analysis of disproportionality, we have considered the controverted evidence regarding the second and third searches, but determined that the totality of all evidence does not raise Cannon's offenses to a level sufficient to overcome the disproportionality.
>
> ¶¶30 We additionally do not need to reach Cannon's contention regarding double jeopardy

On remand, the State never moved for the lower court to take judicial notice or give the Respondent any chance to object to the new evidence or the procedure to introduce the new evidence. Utah Rule of Evidence 201(b) only gives a court discretion to take judicial notice of a fact which is "not subject to reasonable dispute" because the fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." In *Trimble Real Estate v. Monte Vista Ranch, Inc.*, 758 P.2d 451

(Utah Ct. App. 1988), the Utah Supreme Court held that, except in exceptional circumstances, courts would normally refuse to take judicial notice of a fact when such a motion is made for the first time on appeal. See id. at 456. The State presented no "compelling 'countervailing principle'" that would overcome the Utah Courts normal reluctance to take judicial notice in these circumstances.

In *State v. Yates,* 765 P.2d 251 (Utah 1988), the Court stated concerning taking of judicial notice that:

> "It is axiomatic that a court may not judicially notice a judgment in another case... To be noticed, a judgment in another case must be placed in evidence." *Coleman v. Texas Dep't of Public Safety*, 639 S.W.2d 34, 38 (Tex. Ct. App. 1982) (citation omitted). It is improper for a court to sua sponte take judicial notice of records and proceedings in other actions "without giving full notice to the parties and without giving them an opportunity to explain or rebut" the judicially noticed facts. *Ruggles v. Riggs*, 477 A.2d 697, 705-06 (Del. 1984). See *State v. Lance*, 23 Utah 2d 407, 464 P.2d 395, 400 (1970). Furthermore, courts should not take judicial notice of relevant evidence after the record to the proceeding before the court is closed. See *Fireman's Fund Ins. Co. v. Wilburn Boat Co.*, 259 F.2d 662, 664 (5th Cir. 1958).

Using the newly submitted matters, the State creatively argued and prepared Findings of Fact which the Judge wholly adopted on the critical issues concerning the issue excessive punishment for which the Utah Supreme Court had remanded the case. The trial court made findings are based upon other

criminal proceedings never introduced at the original hearing. On the issue of punishment, it was only the Claimant, Linda Cannon, who actually presented evidence on the issue of excessive punishment. She took the stand and testified that she had been subject to actual incarceration as a punishment for the two pounds of marijuana which was found in the refrigerator. The State offered no rebuttal whatsoever until attempting to unilaterally submit supplemental information several years later on remand.

For example, the Court took notice of facts not established at the prior hearing. The court took judicial notice of evidence in an Order to Show Cause Hearing in the Findings of Fact which occurred six months after the August 1994 hearing in forfeiture hearing on February 22, 1995. The lack of Due Process and a fair hearing by the Court's procedure in taking judicial notice is demonstrated by the Findings of Fact and Conclusions of Law of the proceedings which took place in relation to other criminal proceedings in a completely separate case.

Therefore, the District Court erred in supplementing the record by taking judicial notice of matters not considered at the first hearing and the procedure denied the appellant and claimant Due Process and the United States Constitution and Utah Constitution. Mrs. Cannon took the stand and confronted the excessiveness of the forfeiture of her family residence at the

hearing and that evidence is only rebutted by the unilateral submissions of new evidence under improper and unfair of the use of the Rules of Evidence by the taking of judicial notice. Therefore, the Court should strike all evidence not submitted at the original hearing or deny this Petition by adopting the position of the Utah Supreme Court that even considering the contested evidence in the disproportionality analysis the forfeiture cannot stand.

CONCLUSION

For foregoing factual and legal reasons the ruling of the Utah Supreme Court should stand and the State's Petition for Writ of Certiorari should be DENIED.

DATED this 25th day of May, 2000.

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APPENDIX 1

APPENDIX 1

UTAH CODE ANNOTATED 58-37-13 Property subject to forfeiture -- Seizure -- Procedure.

(1) As used in this section:

(a) "Complaint" means a verified civil in rem complaint seeking forfeiture or any criminal information or indictment which contains or is amended to include a demand for forfeiture of a defendant's in personam interest in any property which is subject to forfeiture.

(b) "Drug distributing paraphernalia" means any property used or designed to be used in the illegal transportation, storage, shipping, or circulation of a controlled substance. Property is considered "designed to be used" for one or more of the above-listed purposes if the property has been altered or modified to include a feature or device which would actually promote or conceal a violation of this chapter.

(c) "Drug manufacturing equipment or supplies" includes any illegally possessed controlled substance precursor, or any chemical, laboratory equipment, or laboratory supplies possessed with intent to engage in clandestine laboratory operation as defined in Section **58-37d-3**.

(d) "Interest holder" means a secured party as defined in Section **70A-9-105**(1)(m), a mortgagee, lien creditor, or the beneficiary of a security interest or encumbrance pertaining to an interest in property, whose interest would be perfected against a good faith purchaser for value. A person who holds property for the benefit of or as an agent or nominee for another, or who is not in substantial compliance with any statute requiring an interest in property to be recorded or reflected in public records in order to perfect the interest against a good faith purchaser for value, is not an interest holder.

(e) "Proceeds" means property acquired directly or indirectly from, produced through, realized through, or caused by an act or omission and includes any property of any kind without reduction for expenses incurred in the acquisition, maintenance, or production of that property, or any other purpose.

(f) "Resolution of criminal charges" occurs at the time a claimant who is also charged with violations under Title 58, Chapters 37, 37a, 37b, 37c, or 37d enters a plea, upon return of a jury verdict or court ruling in a criminal trial, or upon dismissal of the criminal charge.

(g) "Violation of this chapter" means any conduct prohibited by Title 58, Chapters 37, 37a, 37b, 37c, or 37d or any conduct occurring outside the state which would be a violation of the laws of the place where the conduct occurred and which would be a violation of Title 58, Chapters 37, 37a, 37b, 37c, or 37d if the conduct had occurred in this state.

(2) The following are subject to forfeiture and no property right exists in them:

(a) all controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this chapter;

(b) all raw materials, products, and equipment of any kind used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this chapter;

(c) all property used or intended for use as a container for property described in Subsections (2)(a) and (2)(b);

(d) all hypodermic needles, syringes, and other paraphernalia, not including capsules used with health food supplements and herbs, used or intended for use to administer controlled substances in violation of this chapter;

(e) all conveyances including aircraft, vehicles, or vessels used or intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, simple possession, or concealment of property described in Subsections (2)(a) and (2)(b), except that:

(i) a conveyance used by any person as a common carrier in the transaction of business as a common carrier may not be forfeited under this section unless the owner or other person in charge of the conveyance was a consenting party or knew or had reason to know of the violation of this chapter;

(ii) a conveyance may not be forfeited under this section by reason of any act or omission committed or omitted without the owner's knowledge or consent; and
(iii) any forfeiture of a conveyance is subject to the claim of an interest holder who did not know or have reason to know after the exercise of reasonable diligence that a violation would or did take place in the use of the conveyance;

(f) all books, records, and research, including formulas, microfilm, tapes, and data used or intended for use in violation of this chapter;

(g) everything of value furnished or intended to be furnished in exchange for a controlled substance in violation of this chapter, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this chapter. An interest in property may not be forfeited under this subsection unless it is proven by a preponderance of the evidence that the interest holder knew, had reason to know of, or consented to the conduct which made the property subject to forfeiture. The burden of presenting this evidence shall be upon the state;

(h) all imitation controlled substances as defined in Section **58-37b-2**, Imitation Controlled Substances Act;

(i) all warehousing, housing, and storage facilities, or interest in real property of any kind used, or intended for use, in producing, cultivating, warehousing, storing, protecting, or manufacturing any controlled substances in violation of this chapter, except that:
(i) any forfeiture of a housing, warehousing, or storage facility or interest in real property is subject to the claim of an interest holder who did not know or have reason to know after the exercise of reasonable diligence that a violation would take place on the property;
(ii) an interest in property may not be forfeited under this subsection if the interest holder did not know or have reason to know of the conduct which made the property subject to forfeiture, or did not willingly consent to the conduct; and
(iii) unless the premises are used in producing, cultivating, or manufacturing controlled substances, a housing, warehousing, or storage facility or interest in real property may not be forfeited under this subsection unless cumulative sales of controlled substances on

the property within a two-month period total or exceed $1,000, or the street value of any controlled substances found on the premises at any given time totals or exceeds $1,000. A narcotics officer experienced in controlled substances law enforcement may testify to establish the street value of the controlled substances for purposes of this subsection;

(j) any firearm, weapon, or ammunition carried or used during or in relation to a violation of this chapter or any firearm, weapon, or ammunition kept or located within the proximity of controlled substances or other property subject to forfeiture under this section; and

(k) all proceeds traceable to any violation of this chapter. There is a rebuttable presumption that all money, coins, and currency found in proximity to forfeitable controlled substances, drug manufacturing equipment or supplies, drug distributing paraphernalia, or forfeit able records of importation, manufacture, or distribution of controlled substances are proceeds traceable to a violation of this chapter. The burden of proof is upon the claimant of the property to rebut this presumption.

(3) (a) Property subject to forfeiture under this chapter may be seized by any peace officer of this state upon process issued by any court having jurisdiction over the property. However, seizure without process may be made when:

(i) the seizure is incident to an arrest or search under a search warrant or an inspection under an administrative inspection warrant;

(ii) the property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding under this chapter;

(iii) the peace officer has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(iv) the peace officer has probable cause to believe that the property has been used or intended to be used in violation of this chapter and has probable cause to believe the property will be damaged, intentionally diminished in value, destroyed, concealed, or removed from the state.

(b) Upon the filing of a complaint, the court shall immediately issue to the seizing agency a warrant for seizure of any property subject to forfeiture which had been seized without a warrant in a manner described in this subsection.

(4) In the event of seizure under Subsection (3), forfeiture proceedings under Subsection (9) shall be instituted within 90 days of the seizure. The time period may by extended by the court having jurisdiction over the property upon notice to all claimants and interest holders and for good cause shown.
(5) Property taken or detained under this section is not repleviable but is in custody of the law enforcement agency making the seizure, subject only to the orders and decrees of the court or the official having jurisdiction. When property is seized under this chapter, the appropriate person or agency may:

(a) place the property under seal;

(b) remove the property to a place designated by it or the warrant under which it was seized; or

(c) take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(6) All substances listed in Schedule I that are possessed, transferred, distributed, or offered for distribution in violation of this chapter are contraband and no property right shall exist in them. All substances listed in Schedule I which are seized or come into the possession of the state may be retained for any evidentiary or investigative purpose, including sampling or other preservation prior to disposal or destruction by the state.

(7) All marijuana or any species of plants from which controlled substances in Schedules I and II are derived which have been planted or cultivated in violation of this chapter, or of which the owners or cultivators are unknown, or are wild growths, may be seized and retained for any evidentiary or investigative purpose, including sampling or other preservation prior to disposal or destruction by the state. Failure, upon demand by the department or its authorized agent, of any person in occupancy or in control of land or premises upon which species of plants are growing or being stored, to produce an appropriate license or proof that he is the holder of a license, is authority for the seizure and forfeiture of the plants.

(8) When any property is forfeited under this chapter by a finding of the court that no person is entitled to recover the property, it shall be deposited in the custody of the Division of Finance. Disposition of all property is as follows:

(a) The state may include in its complaint seeking forfeiture, a request that the seizing agency be awarded the property. Upon a finding that the seizing agency is able to use the forfeited property in the enforcement of controlled substances laws, the court having jurisdiction over the case shall award the property to the seizing agency. Each agency shall use the forfeited property for controlled substance law enforcement purposes only. Forfeited property or proceeds from the sale of forfeited property may not be used to pay any cash incentive, award, or bonus to any peace officer or individual acting as an agent for the agency, nor may it be used to supplant any ordinary operating expense of the agency. The seizing agency shall pay to the prosecuting agency the legal costs incurred in filing and pursuing the forfeiture action. Property forfeited under this section may not be applied by the court to costs or fines assessed against any defendant in the case.

(b) The seizing agency, or if it makes no application, any state agency, bureau, county, or municipality, which demonstrates a need for specific property or classes of property subject to forfeiture shall be given the property for use in enforcement of controlled substances laws upon the payment of costs to the county attorney or, if within a prosecution district, the district attorney for legal costs for filing and pursuing the forfeiture and upon application for the property to the director of the Division of Finance. The application shall clearly set forth the need for the property and the use to which the property will be put.

(c) The director of the Division of Finance shall review all applications for property submitted under Subsection (8)(b) and, if the seizing agency makes no application, make a determination based on necessity and advisability as to final disposition and shall notify the designated applicant or seizing agency, where no application is made, who may obtain the property upon payment of all costs to the appropriate department. The Division of Finance shall in turn reimburse the prosecuting agency or agencies for costs of filing and pursuing the forfeiture action, not to exceed the amount of the net proceeds received for the sale of the property. Any proceeds remaining after payment shall be returned to the seizing agency or agencies.

(d) If no disposition is made upon an application under Subsection (8)(a) or (b), the director of the Division of Finance shall dispose of the property by public bidding or as considered appropriate, by destruction. Proof of destruction shall be upon oath of two officers or employees of the department having charge of the property, and verified by the director of the department or his designated agent.

(9) Forfeiture proceedings shall be commenced as follows:

(a) For actions brought under Subsections (2)(a) through (2)(j), a complaint shall be prepared by the county attorney, or if within a prosecution district, the district attorney, or the attorney general, and filed in a court of record where the property was seized or is to be seized. In cases in which the claimant of the property is also charged as a criminal defendant, the complaint shall be filed in the county where the criminal charges arose, regardless of the location of the property. The complaint shall include:

(i) a description of the property which is subject to forfeiture;

(ii) the date and place of seizure, if known; and

(iii) the allegations of conduct which gives rise to forfeiture.

(b) In cases where a claimant is also charged as a criminal defendant, the forfeiture shall proceed as part of the criminal prosecution as an in personam action against the defendant's interest in the property subject to forfeiture. A defendant need not file a written answer to the complaint, but may acknowledge or deny interest in the property at the time of first appearance on the criminal charges. If a criminal information or indictment is amended to include a demand for forfeiture, the defendant may respond to the demand at the time of the amendment.

(i) Unless motion for disposition is made by the defendant, the determination of forfeiture shall be stayed until resolution of the criminal charges. Hearing on the forfeiture shall be before the court without a jury. The court may consider any evidence presented in the criminal case, and receive any other evidence offered by the state or the defendant. The court shall determine by a preponderance of the evidence the issues in the case and order forfeiture or release of the property as it determines.

(ii) A defendant may move the court to transfer the forfeiture action, to stay all action, including discovery, in the forfeiture, or for hearing on the forfeiture any time prior to trial of the criminal charges. Either party may move the court to enter a finding of forfeiture as to defendant's interest in part or all of the property, either by default or by stipulation. Upon entry of a finding, the court shall stay the entry of judgment until resolution of the criminal charges. Any finding of forfeiture entered by the court prior to resolution of the criminal charges may not constitute a separate judgment, and any motion for disposition, stay, severance, or transfer of the forfeiture action may not create a separate proceeding. Upon the granting of a motion by the defendant for disposition, stay, severance, or transfer of the forfeiture action,

the defendant shall be considered to have waived any claim that the defendant has been twice put in jeopardy for the same offense.

(iii) Any other person claiming an interest in property subject to forfeiture under this subsection may not intervene in a trial or appeal of a complaint filed under this subsection. Following the entry of an in personam forfeiture order, or upon the filing of a petition for release under Subsection (e), the county attorney, district attorney, or attorney general may proceed with a separate in rem action to resolve any other claims up.. the property subject to forfeiture.

(c) A complaint seeking forfeiture under Subsection (2)(k) shall be prepared by the county attorney, or if within a prosecution district, the district attorney, or by the attorney general, either in personam as part of a criminal prosecution, or in a separate civil in rem action against the property alleged to be proceeds, and filed in the county where the property is seized or encumbered, if the proceeds are located outside the state. A finding that property is the proceeds of a violation of this chapter does not require proof that the property is the proceeds of any particular exchange or transaction. Proof that property is proceeds may be shown by evidence which establishes all of the following by a preponderance of the evidence:

(i) that the person has engaged in conduct in violation of this chapter;
(ii) that the property was acquired by the person during that period when the conduct in violation of this chapter occurred or within a reasonable time after that period; and
(iii) that there was no likely source for the property other than conduct in violation of the chapter.

(d) Notice of the seizure and intended forfeiture shall be filed with the clerk of the court, and served upon all persons known to the county attorney or district attorney to have a claim in the property by:

(i) personal service upon a claimant who is charged in a criminal information or indictment; and

(ii) certified mail to each claimant whose name and address is known or to each owner whose right, title, or interest is of record in the Division of Motor Vehicles to the address given upon the records of the division, which service is considered complete even though the mail is refused or cannot be forwarded. The county attorney, district attorney, or attorney general shall

make one publication in a newspaper of general circulation in the county where the seizure was made for all other claimants whose addresses are unknown, but who are believed to have an interest in the property.

(e) Except under Subsection (9)(a) in personam actions, any claimant or interest holder shall file with the court a verified answer to the complaint within 20 days after service. When property is seized under this chapter, any interest holder or claimant of the property, prior to being served with a complaint under this section, may file a petition in the court having jurisdiction for release of his interest in the property. The petition shall specify the claimant's interest in the property and his right to have it released. A copy shall be served upon the county attorney or, if within a prosecution district, the district attorney in the county of the seizure, who shall answer the petition within 20 days. A petitioner need not answer a complaint of forfeiture.

(f) For civil actions in rem, after 20 days following service of a complaint or petition for release, the court shall examine the record and if no answer is on file, the court shall allow the complainant or petitioner an opportunity to present evidence in support of his claim and order forfeiture or release of the property as the court determines. If the county attorney or district attorney has not filed an answer to a petition for release and the court determines from the evidence that the petitioner is not entitled to recovery of the property, it shall enter an order directing the county attorney or district attorney to answer the petition within ten days. If no answer is filed within that period, the court shall order the release of the property to the petitioner entitled to receive it.

(g) When an answer to a complaint or petition appears of record at the end of 20 days, the court shall set the matter for hearing. At this hearing all interested parties may present evidence of their rights of release of the property following the state's evidence for forfeiture. The court shall determine by a preponderance of the evidence the issues in the case and order forfeiture or release of the property as it determines.

(h) When the court determines that claimants have no right in the property in whole or in part, it shall declare the property to be forfeited.

(i) When the court determines that property, in whole or in part, is not subject to forfeiture, it shall order release of the property to the proper claimant. If the court determines that the property is subject to forfeiture and release in part, it shall order partial release and partial forfeiture. When the property cannot be divided for partial forfeiture and release, the court shall order it sold and the proceeds distributed:

(i) first, proportionally among the legitimate claimants;

(ii) second, to defray the costs of the action, including seizure, storage of the property, legal costs of filing and pursuing the forfeiture, and costs of sale; and

(iii) third, to the Division of Finance for the General Fund.

(j) In a proceeding under this section where forfeiture is declared, in whole or in part, the court shall assess all costs of the forfeiture proceeding, including seizure and storage of the property, against the individual or individuals whose conduct was the basis of the forfeiture, and may assess costs against any other claimant or claimants to the property as appropriate.

Amended by Chapter 294, 1996 General Session
Amended by Chapter 198, 1996 General Session